Supreme Court, U.S.
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No. 02-1271 FEB 24 2003

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In The Supreme Court of the United States

CITY OF CHARLESTON, SOUTH CAROLINA,

Petitioner,

v.

A FISHERMAN'S BEST, INC.,
AFB OF CHARLESTON, INC.,
IVAN MILLER,
AND THE FISHING VESSEL TRI LINER,

Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

Robert G. Clawson, Jr.
Clawson & Staubes
304 Meeting Street
Charleston, SC 29401
(843) 577-2026

Charlton DeSaussure, Jr.
Haynesworth Sinkler Boyd, PA
Post Office Box 340
Charleston, SC 29402
(843) 722-3366

Counsel of Record for Petitioner

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond, Virginia 23219 (800) 847-0477

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QUESTIONS PRESENTED FOR REVIEW

Do federal statutes regulating fishing within waters under the exclusive control of the United States preempt a city resolution forbidding the use of a city-owned docking area for the unloading of certain fish, or is that resolution an action of the city in its proprietary capacity that is not subject to preemption under the Supremacy Clause of U.S. Const. art. VI, cl. 2?

Does a proprietary capacity exception to preemption depend on the federal statute authorizing such an exception or does such an exception exist unless Congress expressly or impliedly removes it?

LIST OF PARTIES TO PROCEEDINGS BELOW

The parties to the proceedings in the United States Court of Appeals for the Fourth Circuit are the following:

The City of Charleston, South Carolina, a municipal corporation—Plaintiff-Appellee; A Fisherman's Best, Inc., a corporation organized and existing under the laws of the State of Florida—Defendant-Appellant; AFB of Charleston, Inc., a corporation organized and existing under the laws of the State of South Carolina—Defendant-Appellant; Ivan Miller—Defendant-Appellant; and the fishing vessel TRI LINER—Defendant-Appellant.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

LIST OF PARTIES TO PROCEEDINGS BELOW ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

STATEMENT OF JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 2

ARGUMENT

I. THE RESOLUTION IS AN ACT OF THE CITY IN ITS PROPRIETARY CAPACITY AND IS NOT SUBJECT TO PREEMPTION BY FEDERAL LAW UNDER THE SUPREMACY CLAUSE 10

TABLE OF CONTENTS (CONT'D)

Page

II. THE RESOLUTION IS NOT INVALID UNDER THE SUPREMACY CLAUSE BECAUSE IT DOES NOT INTERFERE WITH FEDERAL LAW 24

CONCLUSION 29

APPENDIX

TABLE OF AUTHORITIES

Cases **Page**

Alameda Newspapers, Inc. v. City of Oakland, 95 F.3d 1406 (9th Cir. 1996) 17, 21

Building & Construction Trades Council v. Associated Builders & Contractors, 507 U.S. 218 (1993) ..... 12, 13, 17, 18 passim

Cardinal Towing & Auto Repair, Inc. v. City of Bedford, 180 F.3d 686 (5th Cir. 1999) 22

City of Charleston v. A Fisherman's Best, Inc., 310 F.3d 155 (4th Cir. 2002) 1

City of Columbus v. Ours Garage & Wrecker Service, Inc., 536 U.S. 424, 122 S. Ct. 2226 (2002) 11, 22

Hughes v. Alexandria Scrap Corp., 426 U.S. 794 (1976) 13, 14, 20

Livadas v. Bradshaw, 512 U.S. 107 (1994) 25

Louisiana Seafood Management Council v. Foster, 917 F. Supp. 439 (E.D. La. 1996) 25

TABLE OF AUTHORITIES (CONT'D)

Cases **Page**

Medtronic, Inc. v. Lohr, 518 U.S. 470 (1996) 22

Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Commission, 461 U.S. 190 (1983) 26, 27

Perkins v. Lukens Steel Co., 310 U.S. 113 (1940) 15

Petrey v. City of Toledo, 246 F.3d 548 (6th Cir. 2001) 18

Printz v. United States, 521 U.S. 898 (1997) 11

Reeves, Inc. v. Stake, 447 U.S. 429 (1980) 14, 16, 20

Silkwood v. Kerr-McGee Corp., 464 U.S. 238 (1984) 25

Sprint Spectrum L.P. v. Mills, 283 F.3d 404 (2d Cir. 2002) 17, 20

TABLE OF AUTHORITIES (CONT'D)

Statutes **Page**

16 U.S.C. §§ 1855 et seq. 7

16 U.S.C. § 1856 ..... 2, 8, 25

28 U.S.C. § 1254 1

28 U.S.C. § 1446 7

47 U.S.C. § 332 20

U.S. Const. art. I, § 8 13

U.S. Const. art. VI, cl. 2 ..... i, 2, 11, 12

Other

Dan T. Coenen, *Untangling the Market – Participant Exemption to the Dormant Commerce Clause*, 88 Mich. L. Rev. 395 (1989) 16

TABLE OF AUTHORITIES (CONT'D)

Other **Page**

Laurence H. Tribe, *American Constitutional Law* § 6-35 (2d ed. 1988) 23

Laurence H. Tribe, *Constitutional Choices* 146 (Harvard University Press 1985) 16

OPINIONS BELOW

The opinion and order of the United States Court of Appeals for the Fourth Circuit reversing the judgment of the United States District Court for the District of South Carolina is reported as *City of Charleston v. A Fisherman's Best, Inc.*, 310 F.3d 155 (4th Cir. 2002), and is set forth in the Appendix beginning at A-1. The order of the Court of Appeals denying the Plaintiff-Appellee's motion for rehearing is not reported and is set forth in the Appendix at A-108 to A-109. The opinion of the District Court is not reported and is set forth in the Appendix beginning at A-71. The judgment of the District Court granting the Plaintiff's motion for summary judgment is not reported and is set forth in the Appendix at A-106 to A-107.

STATEMENT OF JURISDICTION

The order of the United States Court of Appeals for the Fourth Circuit reversing the District Court judgment in favor of the Petitioner and remanding the case was entered on October 31, 2002 (A-1). The Petitioner timely filed a petition for rehearing en banc, which the Court of Appeals denied in an order entered November 26, 2002 (A-108). This Court has jurisdiction to review the order of the Court of Appeals by writ of certiorari under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. art. VI, cl. 2 provides as follows:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Section 1856 of Title 16 is set forth in the Appendix beginning at A-116.

STATEMENT OF THE CASE

In the late 1980s, the commercial fishing industry in the Charleston, South Carolina, area suffered significant setbacks after Hurricane Hugo damaged vessels, docks, and other industry-related facilities and after waterfront property in private hands was increasingly coveted for residential development. Representatives of the shrimping industry contacted the Mayor of the City and requested assistance. The City

began to study the possibility of developing a Maritime Center on the Cooper River within the downtown area of the City.

In light of this study, the City undertook the development of a facility on the Cooper River that could encompass a commercial facility for shrimping and fishing, including docks, a seafood packing and shipping facility, and wholesale and retail markets owned by the City. The City also was constructing the South Carolina Aquarium in close proximity to the Maritime Center. The goal of the Aquarium is to educate the public about the aquatic environment of the State and region, to celebrate this environment, and to encourage practices among the public that will protect and conserve aquatic resources.

In 1997, while the construction of the Maritime Center was nearing completion, a controversy arose over what entities should be allowed to operate and use the City-owned Maritime Center. One faction of the public opposed allowing the Maritime Center to assist commercial fishermen engaged in "longline" fishing because of the damage to swordfish and other pelagic[1]

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[1]"Pelagic" refers to large fish that live in open ocean waters; swordfish are the principal commercial pelagic catch off the South Carolina coast. Marlin and

stock caused by this form of commercial fishing. On the other side were commercial fishermen engaged in longline fishing who desired the unfettered right to pursue this practice. As described by the Court of Appeals, "[l]ongline fishing tackle employs long lines, two to thirty or forty miles in length, with shorter lines attached at intervals carrying baited hooks." (A-6).

On July 21, 1998, the City Council adopted the resolution at issue in this case (hereinafter "the resolution") (A-110). The resolution found that the waters of the City are an integral part of the City's history and that the City's geographic and economic growth are inextricably linked to its waterfront environment (A-110). The City also found that it had made "concerted efforts to protect its waterfront areas from environmentally insensitive uses" (A-110) and reiterated that it has constructed the Maritime Center "to provide a place for uses, both recreational and commercial, that are consistent with those traditionally and historically conducted on the City's waterfront" (A-112). The resolution expressed the City's intent that in seeking proposals for the operation of the Maritime Center that its operation and use be "consistent and compatible with the tenor of other City supported public uses along the

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sailfish are pelagic fish that are accidentally caught and killed by commercial longliners (A-14).

waterfront, particularly the Aquarium to the north" (A-112). The City further declared as follows:

> The City encourages and promotes creativity in the use and operation of the commercial portion of the Maritime Center, but finds that such proposals must, to advance the City's goal, include elements that foster and enhance the public appeal, enhance the public understanding and appreciation of its delicate maritime resources, enhance the preservation of fisheries resources, discourage fish practices that result in wasteful loss of such resources, and include elements compatible and consistent with the educational and environmental mission of the South Carolina Aquarium and the waterfront park[.]

(A-112-13.) The City thereby resolved to allow the Mayor to enter into month-to-month leases for the operation of the Maritime Center, and

> that the use of the Charleston Maritime Center and its appurtenant facilities is hereby prohibited to fishing vessels utilizing pelagic longline tackle, which shall be prohibited from docking or tying

> up at the Charleston Maritime Center and its appurtenant facilities for any purpose other than to purchase fuel or ice or in the case of a storm or other emergency.

(A-114.) The resolution also required that any lessee of the facility be prohibited from using it for the sale, purchase, processing, or unloading of any fish caught by vessels employing longline fishing (A-114). The resolution only impacts the City-owned Maritime Center. It does not prohibit unloading of longline fish at any other facility, public or private, within the City and contains no criminal or civil penalties for its violation.

On November 12, 1998, the City brought the instant action against A Fisherman's Best, Inc., and AFB of Charleston, Inc. (hereinafter "AFB"), in the Court of Common Pleas of the County of Charleston, South Carolina, seeking a declaratory judgment that the resolution is authorized by State law and is not contrary to the Constitution or laws of the United States or South Carolina. AFB answered denying the essential allegations of the complaint and alleging as defenses that the resolution is preempted by federal law, violates various provisions of the United States and South Carolina Constitutions, and violates South Carolina's Home Rule Act. On March 10, 1999, the Court of Common Pleas granted a motion to intervene filed by Respondents Ivan Miller, and the fishing vessel TRI

LINER (hereinafter the "longline defendants"). The action was removed to the United States District Court for the District of South Carolina, on the request of the longline defendants, who filed an answer alleging the same defenses as the other defendants. Jurisdiction for removal to the District Court was based upon 28 U.S.C. § 1446(a).

The City filed a motion for summary judgment and, on June 23, 1999, the District Court entered an order granting the motion (A-71) and a judgment declaring that the City's resolution does not violate the Constitutions or laws of the United States and South Carolina (A-107). The Respondents appealed this judgment to the United States Court of Appeals for the Fourth Circuit.

In an opinion and order dated October 31, 2002, the Court of Appeals reversed the District Court judgment and remanded with directions that judgment be entered in favor of the Respondents (A-59). The Court of Appeals ruled that the resolution conflicted with the Magnuson-Stevens Act, 16 U.S.C. §§ 1855 et seq., and regulations issued under that Act regulating commercial fishing in the Exclusive Economic Zone ("EEZ"), an ocean area under the exclusive fishery management of the federal government. The Court noted that regulations authorize longline fishing in the EEZ between Cape Hatteras, North Carolina, and the Florida east coast and the resolution conflicts with that regulation (A-40-41). It

also found an indirect conflict between federal law and the resolution because it attempted to regulate matters that were within the exclusive jurisdiction of the federal government under the Magnuson-Stevens Act (A-47-48).

The Court of Appeals rejected the City's defenses to the preemption claim, ruling first that the City was "regulating" fishing by the resolution (A-50-51). Second, it found that the resolution did not regulate only within waters under the exclusive control of the State because federal law guarantees commercial fishermen access to landing facilities for catch lawfully made by them within waters under exclusive federal control (A-52). Third, the Court of Appeals determined that 16 U.S.C. § 1856(b) did not vest exclusive or primary jurisdiction with the Secretary of Commerce to determine whether a particular act of a state interferes with a fisheries management plan. Because the City had brought this action for declaratory judgment, it had waived any claim of primary jurisdiction by forcing the Respondents to answer the complaint and raise the issue of preemption (A-54).

Finally, the Court of Appeals ruled that the "proprietary capacity" exception to preemption was inapplicable here. Examining the Magnuson-Stevens Act, the court found "no explicit provision creating a proprietary exception" (A-57) and determined that such an exception could not be inferred from the provisions of the Act. Without any indication that Congress intended

a proprietary capacity exception to apply to the preemption effected by the Act, the Court of Appeals held that the City could not avoid preemption on the basis that the resolution was an act respecting the terms and conditions under which its own property could be used or upon which it chooses to conduct business with the public (A-58). The Court of Appeals not only reversed the judgment in favor of the City, but ordered that summary judgment be granted to the Respondents on remand (A-59).

Judge Luttig filed an opinion dissenting from the judgment pointing out that the majority wrongly assumed that the resolution constituted "government regulation" rather than a proprietary action of the City. He wrote that preemption doctrines apply only to state *regulation*, and "the facts unequivocally demonstrate that the City was 'a lessor of its property, [ ] participating in the economic marketplace for the provision of physical marketplaces'" (A-66-67). The resolution has no enforcement mechanism, and the City may enforce it only by the private remedy of trespass. "Simply, the resolution is a decision by the City, as a participant in the market, as to how it will manage its own property. The citizens weighed in, a legislative decision was made, and now, the City's land is to be managed in conformity with the democratically-derived directive" (A-67).

The dissent also found the majority's reasoning flawed because even assuming state regulation was involved, the resolution does not interfere with activities protected by the Magnuson-Stevens Act. "[W]hen, as here, a municipality does not close its shores, no such piecemeal conflict is even possible. Not only may longline fishermen continue to dock elsewhere along the South Carolina coast, they may continue to dock in the City of Charleston itself – just not at the one dock reached by the resolution" (A-68).

The City filed a petition for rehearing en banc with the Court of Appeals, which was denied in an order filed November 26, 2002 (A-108-09).

ARGUMENT

I. THE RESOLUTION IS AN ACT OF THE CITY IN ITS PROPRIETARY CAPACITY AND IS NOT SUBJECT TO PREEMPTION BY FEDERAL LAW UNDER THE SUPREMACY CLAUSE.

Judge Luttig's dissent in this case accurately describes the nature of the resolution at issue; it is a decision by the City as the owner and proprietor of the Maritime Center concerning with whom the City will do business (A-67). Unlike the majority, the dissent noted

the distinction between acts of governmental entities that are regulatory, which require or forbid certain conduct under pain of some penalty or sanction, and those which are proprietary in character, which involve participation in the marketplace.

The decision below conflicts with this Court's precedent and the decisions of other Circuit Courts because it fails to recognize that the resolution is an act of the City in its proprietary capacity and that the proprietary acts of governmental entities[2] are not, absent Congressional action to the contrary, subject to preemption under the Supremacy Clause of U.S. Const. art. VI, cl. 2. Instead of approaching the preemption issue with the assumption that the resolution is not superseded by federal law, the panel majority required that any exception to preemption for the proprietary acts of state and local governments must be authorized by the terms of the federal law at issue. That approach is not supported by any decision of this or any other court and fails to honor the principles of federalism and state

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[2]The fact that the action at issue here was taken by a municipal corporation and not a state does not affect the resolution of the preemption question. *City of Columbus v. Ours Garage & Wrecker Service, Inc.*, 536 U.S. 424, 122 S. Ct. 2226, 2232 (2002); *Printz v. United States*, 521 U.S. 898, 931 n.15 (1997).

autonomy that are the foundation for the proprietary action exception.

This Court has recognized explicitly the distinction between proprietary and regulatory acts of state and local governments and held that preemption effected by federal law under U.S. Const. art. VI, cl. 2 applies only to actions of governmental entities that are regulatory in nature. The decision in *Building & Construction Trades Council v. Associated Builders & Contractors*, 507 U.S. 218 (1993), held that a provision in a state water authority's bid specifications requiring bidders agree to abide by the terms of a labor agreement, in order to assure labor stability during the term of any contract, was not preempted by the National Labor Relations Act (NLRA). The decision distinguished other cases finding that particular state actions were preempted by the NLRA, explaining as follows:

> When we say that the NLRA pre-empts state law, we mean that the NLRA prevents a State from regulating within a protected zone, whether it be a zone protected and reserved for market freedom . . . , or for NLRB jurisdiction . . . . A State does not regulate, however, simply by acting within one of these protected areas. When a State owns and manages property, for example, it must interact with private participants in

> the marketplace. In so doing, the State is not subject to pre-emption by the NLRA, because pre-emption doctrines apply only to state *regulation*.

Id. at 227 (citations omitted; emphasis in original). The *Building & Construction Trades* cases pointed out that the Court's NLRA preemption decisions had consistently held that it is state "regulation" that is preempted, not actions which constitute the governmental entity's participation in the market as a consumer of services or goods.

A "proprietary capacity" exception also has been recognized in connection with claims that governmental action violates the Commerce Clause of U.S. Const. art. I, § 8. In *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976), this Court determined that the Commerce Clause was not violated by a state's program for the purchase of junk automobiles, even though the program made it harder for out-of-state entities to take advantage of the program, because the state was acting as a market participant, not a regulator. "We do not believe the Commerce Clause was intended to require independent justification for such action. Maryland entered the market for the purpose, agreed by all to be commendable as well as legitimate, of protecting the State's environment." *Id.* at 809.

The purpose and scope of the proprietary capacity/market participant exception to Commerce Clause restraints was discussed at length in *Reeves, Inc. v. Stake*, 447 U.S. 429 (1980), where a policy of a state-owned cement plant favoring in-state purchasers was found immune from a Commerce Clause challenge. This Court reaffirmed the ruling in *Alexandria Scrap* and explained the rationale behind the exception recognized in that case:

> The basic distinction drawn in *Alexandria Scrap* between States as market participants and States as market regulators makes good sense and sound law. As that case explains, the Commerce Clause responds principally to state taxes and regulatory measures impeding free private trade in the national marketplace. . . . *There is no indication of a constitutional plan to limit the ability of the States themselves to operate freely in the free market.* . . . The precedents comport with this distinction. Restraint in this area is also counseled by considerations of state sovereignty, the role of each State "'as guardian and trustee for its people,'" . . . and "the long recognized right of trader or manufacturer, engaged in an entirely private business, freely to exercise his own independent discretion as

> to parties with whom he will deal. . . ." Moreover, state proprietary activities may be, and often are, burdened with the same restrictions imposed on private market participants. Evenhandedness suggests that, when acting as proprietors, States should similarly share existing freedoms from federal constraints, including the inherent limits of the Commerce Clause. . . . Finally, as this case illustrates, the competing considerations in cases involving state proprietary action often will be subtle, complex, politically charged, and difficult to assess under traditional Commerce Clause analysis. Given these factors, *Alexandria Scrap* wisely recognizes that, as a rule, the adjustment of interests in this context is a task better suited for Congress than this Court.

Id. at 436-39 (citations omitted; footnotes omitted; emphasis added). The decision noted that it had heretofore been recognized that "'[l]ike private individuals and businesses, the Government enjoys the unrestricted power to produce its own supplies, to determine those with whom it will deal, and to fix the terms and conditions upon which it will make needed purchases.'" *Id.* at 439 n.12 (quoting *Perkins v. Lukens Steel Co.*, 310 U.S. 113, 127 (1940)).

The concerns over state autonomy and sovereignty identified in *Reeves, Inc.* apply with equal force where the effect of the Supremacy Clause is at issue. A state's resources are its "own" in a way its regulatory powers are not. *See* Laurence H. Tribe, *Constitutional Choices* at 146 (Harvard University Press 1985) ("The principle that necessarily underlies the market participant-market regulator distinction is that, when the state is creating commerce that would not otherwise exist, it has greater freedom to shape that commerce than when it is intruding into a previously existing market."). "It is, in other words, a greater intrusion on state autonomy to restrict a state's use of its own tangible resources than to cabin its otherwise limitless power to coerce through government fiat." Dan T. Coenen, *Untangling the Market – Participant Exemption to the Dormant Commerce Clause*, 88 Mich. L. Rev. 395, 427 (1989). Two key goals of our federalism are the encouragement of novel state economic experiments and fostering governmental responsiveness to distinctive local needs. *Id.* at 429-30; *accord Reeves, Inc.*, 447 U.S. at 438-39. The panel majority's refusal to apply the proprietary action exception fails to honor these principles; it deprives the City of the authority to control the use of its property in the way that its citizens, through the City Council, have deemed it best for the City.

By contrast, the proprietary action exception to federal preemption has been recognized and applied by other federal courts. In *Sprint Spectrum L.P. v. Mills*, 283 F.3d 404 (2d Cir. 2002), the court reversed an order enjoining a school district from enforcing a limitation on radio frequency emissions contained in its lease of school property space to a telecommunications provider for operation of a cellular communications tower. Citing *Building & Construction Trades*, the court held that not all actions by a state or local government entity constitute regulation and "such an entity, like a private person, may buy and sell or own and manage property in the marketplace." *Id.* at 417. The court viewed the actions of the school district as plainly proprietary because it was not issuing an ordinance or rule regulating emission levels, was not punishing anyone for past conduct, and was not imposing conditions on any property other than the property covered by the lease. *Id.* at 420. "[A] private party who has the right to refuse outright to lease his property also has the right to decline to lease the property except on agreed conditions." *Id.* at 421. Because nothing in federal law required cellular communications towers to operate at particular emission levels, the school district, like any other private party, could elect not to grant a lease of property for that purpose unless the telecommunications provider agreed to limit emissions to a lower level. *Id.*; *see also Alameda Newspapers, Inc. v. City of Oakland*, 95 F.3d 1406, 1416-17 (9th Cir. 1996) (city's resolution which canceled its

subscriptions to a newspaper and barred the city from advertising in the newspaper in order to show support for a labor strike against the newspaper was not preempted by the NLRA; the resolution constituted the city's action as a consumer of goods and services and did not constitute regulation subject to preemption by federal law); *Petrey v. City of Toledo*, 246 F.3d 548, 558 (6th Cir. 2001) (recognizing proprietary action exception applied in context of city contract for towing services; exception was not limited to NLRA cases).

The City similarly was acting in its proprietary capacity and as a market participant in adopting the resolution respecting the use of the Maritime Center facilities. Those facilities are owned by the City and, like any other private property owner, the City is allowed to determine how and by whom that property should be used. The resolution is not a "regulation" of fishing subject to preemption by the Magnuson-Stevens Act; it does not forbid longline fishing in the EEZ and does not impose any penalty upon those who engage in longline fishing and bring their catch within the City limits. All the resolution does is control the use of a facility that the City constructed, owns, and operates, and as such is a proprietary act of the City, which is exempt from preemption by federal law.

Although the majority opinion recognized the proprietary act exception as set forth in the *Building &*

Construction Trades decision, it clearly erred in the application of that exception. The panel incorrectly hinged its preemption analysis on whether the Magnuson-Stevens Act contains an express or implied proprietary exception to the preemption doctrine (A-55). Examining the Act, it found "no explicit provision creating a proprietary exception," and found no basis for implying such an exception from the Act (A-57). It went on to write that it could not find that Congress intended that a proprietary exception should apply under the Magnuson-Stevens Act (A-59).

The majority's analysis is erroneous and directly conflicts with the precedent of this Court and other circuit courts. Although this Court wrote in the *Building & Construction Trades* decision that a proprietary act exception was consistent with the policies of the NLRA, nothing in that opinion indicated that statutory authorization is required for application of the proprietary act exception. Quite to the contrary, this Court held there that "[i]n the absence of any expressed or implied indication by Congress that a State *may not* manage its own property when it pursues its purely proprietary interest, and where analogous private conduct would be permitted, this Court will not infer such a restriction." 507 U.S. at 231-32 (emphasis added). Thus, it is only where Congress indicates that any intended preemption extends to the management of property that the proprietary act/market participant

exception is applicable. The panel majority's requirement of express or implied legislative authorization for the exception is contrary to this ruling.

The decision below also is inconsistent with *Reeves, Inc.*, 447 U.S. at 439, and *Alexandria Scrap*, 426 U.S. at 810 n.19, which hold that state action as a market participant is not subject to Commerce Clause restraints *unless* Congress has indicated that some adjustment of the relative powers of the state and federal governments is necessary. *Reeves, Inc.*, 447 U.S. at 437, recognized that nothing in the constitution limits the ability of states to operate freely in the marketplace. This autonomy must be affirmatively displaced by Congress and does not depend, as the majority held below, upon express or implied allowance by Congress.

The correct analysis was set forth by the Second Circuit in *Sprint Spectrum*, which began its preemption analysis by noting that courts are reluctant to find that state and local actions are preempted by federal law and that "'[c]onsideration under the Supremacy Clause starts with the basic assumption that Congress did not intend to displace state law.'" 283 F.3d at 416 (quoting *Building & Construction Trades*, 507 U.S. at 224). Although the court noted that the preemptive effect of federal telecommunications legislation is broad and that 47 U.S.C. § 332(c)(7)(B)(iv) specifically prohibited regulation of the placement of wireless facilities on the basis of the

environmental effects of radio frequency emissions, it nonetheless found that the proprietary action exception applied because it saw "nothing in the TCA to suggest that Congress meant to preempt a governmental entity's conduct that does not amount to regulation." Unlike the panel majority's decision in the instant case, the Second Circuit focused on whether language could be found in the federal law that *extended* preemption to nonregulatory actions, not on whether there was Congressional authorization to exempt proprietary actions of state and local governments.

In *Alameda Newspapers, Inc.*, 95 F.3d at 1416, the Ninth Circuit also indicated that application of the proprietary action exception does not depend on Congressional authorization. It held that it would not be proper to assume Congress had intended, by enacting the NLRA, to require state and local governments to purchase goods or services they did not want. That court was "not willing to assume that Congress wished to limit the right of states or municipalities to participate in consumer boycotts or intended them to act in a manner that contravenes their civic consciences." *Id.*

There is no support for the panel majority's determination in this case that the proprietary capacity applies only if there is some explicit or implied authority

authorizing the exception.[3] Its reasoning is contrary to the very starting point of preemption analysis—"'the assumption that the historic police powers of the States were not to be superseded by a Federal Act unless that was the clear and manifest purpose of Congress.'" *City of Columbus v. Ours Garage & Wrecker Service, Inc.*, 536 U.S. 424, 122 S. Ct. 2226, 2235 (2002) (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996)).

Thus, when a government acts in its capacity as a private landowner or market participant, preemption generally does not apply. In this case, the City is not regulating anything. It is merely undertaking to determine how its own property will be used.

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[3]*Cardinal Towing & Auto Repair, Inc. v. City of Bedford*, 180 F.3d 686, 691 (5th Cir. 1999), incorrectly cited by the majority as an ERISA preemption case, applied the proprietary action exception because this Court "has found that when a state or municipality acts as a participant in the market and does so in a narrow and focused manner consistent with the behavior of other market participants, such action does not constitute regulation subject to preemption." The decision in no way held that application of the proprietary action exception depended upon express or implied Congressional approval.

This decision involves issues critical to a wide range of municipal activities. While the City most probably could not prohibit the sale of *Playboy* magazine within the City, it should not be required to sell it at the Maritime Center or other City-owned property. A blanket prohibition on the sale within the City of goods produced overseas with child labor also may be preempted by federal law, but this does not require the City to offer such goods for sale at its Visitors Center. If the autonomy of state and local governments over their proprietary activities is restricted such that the governments cannot be responsive to the needs and desires of their citizens, these entities may choose not to engage in salutary activities. *See* Laurence H. Tribe, *American Constitutional Law* § 6-35 at 539-40 (2d ed. 1988) (if a state is not free to control distribution of an access to resources it creates, it may give up efforts to create or conserve them).

The City resolution banning longline fishermen from unloading at this one City property gives the City no greater rights than a private property owner—the rights to ask those who are unwelcome to leave and to pursue trespass remedies against those who refuse. This Court's precedent establishes that this action of the City is not covered by the preemption effected by the Supremacy Clause and the lower court's ruling to the contrary should be reversed.

II. THE RESOLUTION IS NOT INVALID UNDER THE SUPREMACY CLAUSE BECAUSE IT DOES NOT INTERFERE WITH FEDERAL LAW.

Even assuming the resolution constitutes regulation of fishing, it is not preempted by the Magnuson-Stevens Act because it does not obstruct the federal interest intended to be furthered by the Act. Although the majority opinion of the Court of Appeals held that there are "numerous" conflicts between the resolution and the Act and its regulations, there are really only two conflicts: (1) the Act and regulations allow longline fishing within the EEZ while the resolution forbids use of the Maritime Center facilities to unload or process fish caught using that kind of tackle, and (2) the Act and regulations allow swordfish and billfish to be caught but the resolution forbids use of the Maritime Center to process those species (A-114-15). But as pointed out in Judge Luttig's dissent, the resolution does not forbid landing any fish, by whatever means caught, within the City or elsewhere, does not forbid the use of longline tackle, and does not close the shores of the State to any fisherman. The resolution controls the operation of a single City-owned dock and does not prevent commercial fishermen from pursuing their calling as they see fit and as allowed by the Act (A-68).

State and local regulations can be preempted in two ways. If Congress intends to occupy a given field, any state law falling within that field is preempted. Again, determining that intention begins with the presumption that Congress did not intend to displace state law. *Building & Construction Trades*, 507 U.S. at 224. If Congress has not entirely displaced state regulation over the matter in question, state law is still preempted to the extent it actually conflicts with federal law, that is when it is impossible to comply with both state and federal law or where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress. *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984). State or local action is not deemed preempted unless it has a "real effect on federal rights." *Livadas v. Bradshaw*, 512 U.S. 107, 119 (1994).

This certainly is not a case in which federal law totally occupies the field to the exclusion of state law. The Act contemplates that states continue to have the authority to regulate fishing, specifically providing that "nothing in this chapter shall be construed as extending or diminishing the jurisdiction or authority of any State within its boundaries." 16 U.S.C. § 1856(a)(1); *see Louisiana Seafood Management Council v. Foster*, 917 F. Supp. 439, 443 (E.D. La. 1996) (while Congress intended federal jurisdiction within the EEZs to be exclusive, the Magnuson-Stevens Act does not otherwise effect complete preemption of state law).

Therefore, preemption might be found here if there is an "actual conflict" between state law and federal law, i.e., it is impossible to comply with both state and federal law or the state law stands as a barrier to the accomplishment of the full purposes of federal law. Clearly it is possible for the resolution to coexist with federal law. Federal law does not require persons to receive fish caught with longline tackle nor does federal law require longline tackle to be used by commercial fishermen within the EEZ. Commercial fishermen can still pursue their calling within the EEZ and can still use longline tackle to catch fish. They may unload their catch within the City at their own facilities or anywhere a private dock owner will allow them. The only thing they cannot do is avail themselves of the Maritime Center facilities for unloading or processing swordfish and billfish or fish caught using longline tackle. *See Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Commission*, 461 U.S. 190 (1983) (state law requiring that there be adequate capacity for spent fuel before proposed nuclear power plant is approved was not preempted; federal law and approval thereunder does not require development of nuclear plants and compliance with both federal and state law is possible).

Nor does the resolution set up an obstacle to the accomplishment of the purposes of the Magnuson-Stevens Act. Even if the resolution makes it more difficult for swordfish and other fish caught with longline

tackle to find its way to retail fish markets, the same could be said if the City had not developed the Maritime Center at all. To accept the notion that the resolution creates an obstacle to federal policy would mean that a city would be acting contrary to the Magnuson-Stevens Act by failing to devote city-owned property to use as docking space for fishermen. A city's failure to devote space to aid in the distribution of fish cannot be deemed to be an "obstacle" to the purposes of the Magnuson-Stevens Act because it does not prevent commercial fishermen from catching or selling fish. As Judge Luttig accurately wrote, "this single resolution does not interfere at all, much less significantly with longline fishing. It does not even prevent longline fishermen from landing within this one City's jurisdiction" (A-68). Thus, there is not the kind of restriction upon commercial fishing here which sets up an obstacle to the purposes of federal law. *See Pacific Gas & Electric*, 461 U.S. at 222-23 (although policy of federal law was to promote development of nuclear energy, state law that had the effect of slowing or stopping that development for economic reasons was not preempted).

The majority below wholly overstated the effect of the resolution when it wrote that "a state or municipal sovereign owning a dock can effectively bring to its knees an industry engaged in bringing ashore fish caught in federal waters – Boston could shout down codfishing and a California seaport can idle the tuna fleet" (A-52). This

might be true if a municipality banned the landing of certain fish in its jurisdiction—but that is not the case here. The City only seeks the rights of a private landowner with respect to its own property. The City cannot bring the North Atlantic fishing industry to its knees by its resolution because fishermen will simply seek other facilities to land their catch. To the extent the issue turns on whether certain fish are barred from the City as a practical matter, the record does not support the majority's conclusion that the resolution actually has that effect. At the time the resolution was passed, at least one other facility devoted to the unloading and processing of fish existed, and it was uncontested that other property within the City could be devoted to that purpose (A-68-69). The City was not required to build a facility for these fishermen to land. And, these fishermen have never used City facilities.

Therefore, even if the resolution constituted "regulation" of fishing by the City that is subject to the restraints of the Supremacy Clause, it does not interfere with the purposes of the Magnuson-Stevens Act. The Supremacy Clause and preemption principles recognized by this Court do not go so far as to require state and local governments be co-opted into assuring that they take all actions necessary to further the goals of each and every federal law. The ruling of the majority below has just that effect and it should be reversed to assure that state

and local governments retain the sovereignty granted to them under the United States Constitution.

CONCLUSION

For the reasons set forth above, the Petitioner, the City of Charleston, South Carolina, respectfully requests that this Court grant the Petition for Writ of Certiorari to the Court of Appeals for the Fourth Circuit.

Respectfully submitted,

ROBERT G. CLAWSON JR.
Clawson & Staubes
304 Meeting Street
Charleston, SC 29401
(843) 577-2026

CHARLTON DESAUSSURE JR.
Haynsworth Sinkler Boyd, PA
Post Office Box 340
Charleston, SC 29402
(843) 722-3366

Counsel of Record for Petitioner

No._____

In The Supreme Court of the United States

CITY OF CHARLESTON, SOUTH CAROLINA,

Petitioner,

v.

A FISHERMAN'S BEST, INC.,
AFB OF CHARLESTON, INC.,
IVAN MILLER,
AND THE FISHING VESSEL TRI LINER,

Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Fourth Circuit

APPENDIX

Robert G. Clawson, Jr.
Clawson & Staubes
304 Meeting Street
Charleston, SC 29401
(843) 577-2026

Charlton DeSaussure, Jr.
Haynesworth Sinkler Boyd, PA
Post Office Box 340
Charleston, SC 29402
(843) 722-3366

Counsel of Record for Petitioner

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond, Virginia 23219 (800) 847-0477

TABLE OF CONTENTS

Page

Opinion of the United States Court of Appeals for the Fourth Circuit dated October 31, 2002 ..... A-1

Order and Opinion of the United States District Court for the District of South Carolina filed June 23, 1999 ..... A-71

Judgment of the United States District Court for the District of South Carolina entered June 23, 1999 ..... A-106

Order of the United States Court of Appeals for the Fourth Circuit Denying Petition for Rehearing filed November 26, 2002 ..... A-108

Resolution of the Council of the City of Charleston entered July 21, 1998 ..... A-110

Text of 16 U.S.C. § 1856 ..... A-116

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

CITY OF CHARLESTON, SOUTH CAROLINA, a municipal corporation, *Plaintiff-Appellee,*	)	
v.	)	No. 99-1991
A FISHERMAN'S BEST, INCORPORATED; AFB OF CHARLESTON, INCORPORATED; IVAN MILLER; and the fishing vessel TRI LINER, *Defendants-Appellants.*	)	

Appeal from the United States District Court
for the District of South Carolina, at Charleston.
Patrick Michael Duffy, District Judge.
(CA-99-828-2-23)

Argued: April 3, 2000

Decided: October 31, 2002

Before LUTTIG and MOTZ, Circuit Judges, and John C. GODBOLD, Senior Circuit Judge of the United States Court of Appeals for the Eleventh Circuit,

sitting by designation.

Reversed and remanded by published opinion. Senior Judge Godbold wrote the majority opinion, in which Judge Motz joined. Judge Luttig wrote a dissenting opinion.

COUNSEL

ARGUED: David Earl Frulla, BRAND & FRULLA, Washington, D.C., for Appellants. Timothy Alan Domin, CLAUSON & STAUBES, L.L.C., Charleston, South Carolina, for Appellee. **ON BRIEF:** Andrew D. Herman, BRAND & FRULLA, Washington, D.C., for Appellants. Robert G. Clawson, Jr., CLAUSON & STAUBES, L.L.C., Charleston, South Carolina; William B. Regan, REGAN & CANTWELL, Charleston, South Carolina, for Appellee.

OPINION

GODBOLD, Senior Circuit Judge:

I. *Background*

This appeal concerns whether federal law preempts a resolution of the City Council of the City of Charleston, South Carolina enacted July 21, 1998, relating

to its Maritime Center docks. The resolution included these prohibitions, which we have numbered for convenience:

> [Par. 1]: "the use of the Charleston Maritime Center and its appurtenant facilities is hereby prohibited to fishing vessels utilizing pelagic longline tackle, which shall be prohibited from docking or tying up at the Charleston Maritime Center and its appurtenant facilities for any purpose other than to purchase fuel or ice or in the case of a storm or other emergency."
>
> [Par. 2]: "any Lessee or user of any part of the Charleston Maritime Center and its appurtenant facilities shall be prohibited from selling, purchasing, processing or unloading any fish from or caught by pelagic longline fishing vessels."
>
> [Par. 3]: "no billfish or swordfish from any source of any kind shall be sold, purchased, processed or unloaded at the Charleston Maritime Center and its appurtenant facilities."

A copy of the resolution is attached as Exhibit A to this opinion.

The City brought this suit in South Carolina state court on November 13, 1998, seeking a declaratory

judgment under South Carolina law. It named as defendants two corporations that were seeking to operate the Maritime Center. We describe them as the "longline defendants" and as "AFB." The City alleged that it was entitled to lease the Maritime Center for operation, as directed by the resolution, under provisions of the South Carolina Constitution and the South Carolina Home Rule Act, and that such operation of the Maritime Center would not violate the rights of the longline defendants under the Constitution of either the United States Constitution, or the State of South Carolina, nor would it violate any federal or state law. The City also asserted that the longline defendants had made known that they would seek to enjoin any attempted use of the Maritime Center in accordance with the resolution, and it sought a judgment that its proposed use was constitutional and legal in all respects.

The defendants responded, alleging the resolution and implementation thereof violated the Supremacy Clause, Due Process Clause, Equal Protection, and Commerce Clause of the Untied States Constitution as well as the Due Process and Equal Protection Clauses of the South Carolina Constitution and the South Carolina Home Rule Act. They alleged that the resolution and its implementation were preempted by federal law. The defendants admitted that they would seek to enjoin any attempt by the City to use commercial facilities at the

Maritime Center in any way that excluded longline fishing.

Ivan Miller and his vessel the Tri Liner intervened and removed the case to the United States District Court for the District of South Carolina.

After a hearing on June 22, 1999 the court granted summary judgment to the City on all claims and the following day entered a judgment to that effect. Both the order and judgment stated that the resolution did not violate "the United States Constitution or the laws of the State of South Carolina as presented to this court." App. at 340, 363.

We set out the background in detail and necessary definitions.[1]

Pelagic refers to fish that live in ocean waters. Swordfish are a highly mobile species (HMS) of pelagic fish that move freely in ocean waters of the world, including waters off United States coasts. HMS are

---

[1]Most of the many citations to statutes in this opinion are to Title 16 of the United States Code. Therefore, for all references to sections of Title 16 we will utilize only the section number. Citations to other statutes will include the Title number.

subject to many statutory provisions and regulations that do not apply to other species.

An FMP is a fishery management plan for a geographical region, prepared under United States law by a statutory regional council (or the Secretary of Commerce). A council serves as a regulator, planner, and sometimes enforcer in fish and fishery matters. Section 1853(a) contains provisions that must be included in an FMP and must be consistent with national standards.

Waters from the South Carolina coastline seaward for three miles are state waters. From the seaward boundary of state waters out to 200 miles from the coastline are federal waters known as the Exclusive Economic Zone (EEZ), created by proclamation of the President. Proclamation No. 5030, 48 Fed. Reg. 10605 (March 10, 1983). The United States claims sovereign rights and exclusive fishery management authority over fish and fishery resources within the EEZ. § 1811.

Shrimping and longline fishing for swordfish are the two major components of the fishing industry in waters off the South Carolina coast. Over ninety-eight percent of the swordfish catch made by swordfish vessels in waters off South Carolina is made with longline tackle. Longline fishing tackle employs long lines, two to thirty or forty miles in length, with shorter lines attached at intervals carrying baited hooks. Letter from Chairman

South Carolina Natural Resources Board to the Secretary of Commerce 1/16/98. App. at 182. It is a relatively new method of fishing in this country, developed over the past twenty to twenty-five years. Substantially all commercial swordfishing occurs in the EEZ.

Waters off the South Carolina coast are a highly desirable locale for swordfish fishing. Swordfish migrate there for reproduction and nurturing. This produces an abundance of swordfish, especially small fish. Most of the commercial fishermen landing fish off South Carolina fish from the Florida Straits (south tip of Florida) to Cape Hatteras (in North Carolina). *Briefing Paper, Concerning the Pelagic Longline Fishery Off South Carolina A Special Report to the Marine Advisory Committee, South Carolina Department of Natural Resources, Marine Resources Division, Office of Fisheries Management.* App. at 195. Some of these vessels are transients that follow fish up and down the Atlantic coast, some as far north as New England.

In the late 1980s the commercial fishing industry in the Charleston area was in distress. Hurricane Hugo damaged vessels, docks and other facilities. The Mayor of Charleston was approached by a representative of shrimpers who requested that the City help the fishing industry. The City responded. It retained an expert in seaport planning to evaluate market support by commercial fishermen for dock space at the Maritime Center, an existing dock site owned by the City. The

expert's report described the fishing industry as contributing strongly to the state's cultural diversity and identity, particularly in coastal counties, and to South Carolina's international commerce since much of its seafood harvest is sent out of state. The report also described a decline in economic health of the Charleston community. It identified Shem Creek, a privately owned dock not far from the Maritime Center, as Charleston's closest link to the commercial fishing industry. The expert reported that within approximately 100 miles of Charleston, except for the Maritime Center, there was no major landing dock for fin fish (i.e., not shrimp) that serviced transient offshore vessels.

Both shrimpers and fin fishers were reported to suffer from want of dock space and services at nearby Shem Creek. Moreover, it noted the Shem Creek facility was under threat of closing because of gentrification in the area and possible better uses for the site. It closed during the pendency of this case. According to the expert, for transient boats fishing off South Carolina, the site proposed by the City for development had an advantage over Shem Creek and other South Carolina ports because it was adjacent to the Charleston Port Authority's deep-water channel. *Executive Summary, Market Analysis by ZHA, Inc.* App. at 299. Transient vessels particularly benefitted from access to the deep-water channel because they are larger than many local boats and their captains need not become closely familiar

with local waters and tidal conditions in order to dock there. *Id.* at 299.

The expert addressed what he termed to be the most critical need of the local commercial fishing industry: docking space and essential dock-related services. *Id.* at 300. His report then said:

> Besides this accommodation for shrimp landings, other handling and marketing/distribution activities at the facility will be oriented toward long-line fin fishermen. These include both local and non-local fishermen who follow high-value migratory species, particularly swordfish and tuna. The orientation toward long liners will complement the local shrimping activity. Executive Summary, Market Analysis Regarding Commercial Fishing Demand for Dock Space at the City of Charleston's Fishing Industry Waterfront Development.

App. at 300.

The City concluded that the commercial fishing industry was on a slow and constant decline. The number of transient out-of-state vessels coming to Charleston was declining. John Deehan, Director of Revitalization for the

City of Charleston, described the situation this way: without help, families that engaged in fishing and shrimping in South Carolina were going to be "out of business and gone." App. at 295. The City completed a plan to extend and improve the Maritime Center. It requested an Economic Development Agency (EDA) grant of $2,150,000 and agreed to designate for the project an acre of waterfront land valued at $1,600,000.

The City stated its intent to lease the Maritime Center to a private sector business or a cooperative "for the benefit of the shrimpers/fishermen." It proposed to demolish two existing docks, rebuild a permanent dock, construct a floating dock, build and equip a fish market, and purchase an acre of adjoining land. The project would provide home port facilities for thirty large long-haul vessels. In addition to dockage, the proposal provided for marketing catch through a retail and wholesale outlet, an administrative infrastructure to handle business affairs of the revitalized fishing industry, and a restaurant that would use local catch.

The proposal did not indicate or imply that longline fishermen would be excluded from the facilities or that swordfish, their principal catch and an important food source, would be barred. Nor did it indicate that any plans the City might have for non-commercial development in the area were part of the Maritime Center. It expressed no concern about possible adverse

effects of the project on nearby facilities. The Mayor told the City Council that having boats tie up at Charleston would be historically accurate, attractive, and appropriate for waterfront use and that the availability of fresh seafood would be an economic benefit to the area.

An EDA grant of $2,100,000 was approved. The leasing provision in the grant's Special Terms and Conditions provided:

> Any leasing or renting of the facilities involved in this project shall be subject to the prior written approval of EDA. Prior to EDA granting said approval, it must be satisfied, *inter alia,* that said lease arrangement is consistent with the authorized general and special purpose of the grant; that said lease arrangement will provide adequate employment and economic benefits for the area in which the property is located. . . .

Before the dock project began the City was developing a non-commercial area on the waterfront to include parks, walkways, natural areas, an aquarium and public access to the water. This project was managed by the Charleston County Park and Recreations Commission (PRC). Voters of Charleston County had approved a bond issue with proceeds to go to PRC to develop non-

commercial areas of the waterfront. The City agreed that PRC would lease the proposed maritime development, supply expert management for it, and sub-lease its facilities to users.

The City agreed to subsidize PRC for five years for the difference between the amount PRC would receive from the on-site operator and the amount PRC would pay the City as primary lessee. The subsidized revenues were to come from parking fees at the City's waterfront facilities.

PRC, as primary lessee, set about to sub-lease the commercial facilities to an on-site operator pursuant to its procurement policy, which required competitive bidding. PRC distributed a request for proposals for an interested party to manage a full-scale commercial pier, sub-lease moorings to commercial shrimpers and fishing vessels, and operate related support facilities such as a retail/wholesale packing facility and fuel and ice. The request contained no limitations on the kind of tackle or methods of fishing that users of the facility should employ. Rather, it referred generally to commercial shippers and commercial fishermen. It did not address City efforts to develop non-commercial facilities in public areas of the waterfront.

Pursuant to the request for proposals, PRC selected as operators the original defendants in this case,

A Fisherman's Best, Inc. and Low-Country Lobsters, Limited. Low-Country was later incorporated as "A Fisherman's Best of Charleston, Inc.," to operate a retail fish market at the Maritime Center under a sub-lease from AFB.

The AFB proposal included plans to lease dock space to several longline fishing vessels and to perform services for them. Included were its plans to attract to Charleston twelve fishing vessels, four that AFB owned and four that had traded with AFB at other sites. AFB also planned to locate a fish market on the premises. PRC issued a letter of intent to award the sublease to AFB as operator and entered into negotiations with AFB for terms.

A bitter public controversy arose in Charleston involving newspapers, television, radio, public meetings, and organized protests against public figures including the Mayor. During the spring and summer of 1997 a sunburst of events occurred. The precise sequence is not always clear from the record, but the tide of events, the roles of players, and their relative positions are clear.

Recreational and sport fishing interests in Charleston opposed the project for improving the Maritime Center. Generally they oppose commercial longline fishing and longline fishing for swordfish. They

regard swordfish as a top trophy for saltwater sports fishermen and they compete with commercial fishermen for available swordfish. In Charleston they asserted that the swordfish stock was decreasing and they feared that additional demands on the stock might destroy the species. They felt that the improved facility would attract more transient vessels to fish for swordfish in the EEZ, which would increase pressure on swordfish resources off South Carolina. They submitted that swordfishing contributes excessively to by-catch (fish caught and discarded because not desired or too small), especially small swordfish that must be thrown away. They viewed swordfishing and swordfish vessels as disastrous to the environment. They considered government regulation of fish and fisheries as slow and inefficient and felt that management of swordfish by the United States and by international entities is not satisfactory.

On the other hand commercial swordfish fishermen and their proponents felt that they had been "ganged up on" by politicians, the South Carolina Department of Natural Resources Board, and the National Marine Fishery Services (an agency of the Commerce Department to which the Secretary has delegated some of his fish and fish management responsibilities). They pointed out that they make their living in a highly-regulated and legally-defined industry and must compete for swordfish with persons who fish only for sport. They considered that they lack political

and public support comparable to that enjoyed by more affluent sportsfishermen. They felt that they are branded as dishonest and as having no concern for the health of fishing resources. They pointed to the significance of swordfish as a food resource and to the emphasis placed by Congress on this function. They felt that they are the chief supporters of government regulations.

Recreational Fishing Alliance (RFA) entered the controversy. RFA is a national non-profit organization whose stated purpose is rebuilding and preserving fisheries in the United States. It seeks to politically organize non-commercial saltwater anglers and to advance their interests, protect jobs in the marine boat and tackle industry, and ensure the long-term sustainability of our nation's saltwater fisheries. It is allied in principle to sport and recreational fishing and generally opposes commercial fishing. It seeks to end longline fishing as an acceptable method of commercial fishing. RFA sent representatives to Charleston and became involved in the public controversy for two months or more. It wrote letters, contacted local officials and raised public consciousness. At public forums held by PRC, the President of RFA denounced longline fishing. By mail, newspapers and radio persons were urged to protest to the Mayor against alleged use of City tax funds to bring out-of-state fishing vessels to South Carolina waters. Substantial political presence arose in opposition to the project.

On May 5, 1997 a public meeting was held by the City Council at which a group of panelists participated in a question and answer period concerning the proposed development. One of the speakers was John Deehan, Director of Revitalization for the City. He did not represent that he was speaking for the City. He described pressures on the commercial fishing industry and recommended creation of an infrastructure at Charleston as a permanent home for the fishing industry along with other uses. He spoke of the possibility of using the proposed Maritime Center facility as a site for fishing tournaments and other special events.

Deehan explained that PRC had entered into a master lease agreement with the City that had been sent to EDA and approved by it and thus that PRC had "become a part" of the agreement with EDA. Deehan described numerous newspaper articles that, from the beginning of the proposed development, had classified it as redevelopment of the fishing industry and referred to it as "concerning commercial shrimping and commercial fishing." He explained that PRC's request for proposals for an operator for the Center did not specify the kind of tackle that fishermen using the Center were to use:

> We don't do that. We can't tell people what kind of tackle to use. We said [in the requests for proposals] commercial shrimpers and commercial fishermen.

App. at 281.

Deehan explained that the EDA grant required that as soon as the facility was completed it was to be operational for the purposes of revitalizing the commercial fishing and commercial shrimping industry. He projected this would occur during the current month. App. at 284-85. He anticipated equal access by shrimpers and fishermen. App. at 286. With specific respect to longlining, Deehan explained:

> The city really feels very strongly that the city is not authorized to be in the regulatory business and that PRC is not in the regulatory business either. It's legal. Longlining is legal, and it is sanctioned and regulated by the Federal government.

App. at 286.

He described longline fishing as a migratory industry, members of which have been fishing for years in waters off South Carolina. Longliners move from Florida to Maine and "go where the fish are." He stated that the changing of laws governing migrating longline vessels is a matter for legislators and not for the City or PRC. App. at 287.

With respect to fishing tackle Deehan was asked:

COMMISSIONER MATHER: Mr. Deehan, I have a question. Would the Maritime Center be in compliance with the grant if it severely restricted and/or eliminated one type of tackle for the fishing fleet for the Maritime Center?

MR. DEEHAN: I suspect that's a legal question, and I'll try to do my best in answering it. Since the longline fishing fleet is licensed by the Federal government and regulated by the Federal government, is [sic] says to me that that is a legal practice.

App. at 291.

A questioner suggested that the Maritime Center was to be set up as a private business and inquired whether the Center could decide what businesses it wanted to service. Deehan responded:

MR. DEEHAN: Mr. Chairman, if I may state to the commission, public entities are held to a different standard than the private sector. We know that from our activities in the city with the city market. With any business that the city or PRC

> operates, we are held to a different standard. We are not private sector.

App. at 292.

Deehan was asked why the lease to PRC could not be changed, and he replied that he had discussed this with EDA and had been told that the grant could not be amended and that the lease, as part of the grant, could not be amended, and that legally it was required that the specific purposes for the grant be carried out. App. at 290. He was asked why a seafood packaging plant (a processing facility to be part of the Maritime Center development) was to be located in the middle of a tourist section. He replied:

> [The expert planner] gave us the Waterfront Park, which is a world class park and certainly the finest in the low country. I don't think anyone that has been there can dispute that because it's a really fine waterfront park.
>
> We have designed a facility for the shrimping and fishing industry and for the recreational industry. There is a second pier, which we seem to forget talking about. We suspect that the fish smells the same whether it's on a recreational boat or

> on a shrimp boat or on a commercial fishing boat. It's all fish. We designed a facility that we think will handle that.

App. at 294.

Deehan noted that in the past year thirty-five or forty boats had off-loaded their catches at the Maritime Center. The improved Center would, he said, have a capacity of thirty boats, presumably fifteen for shrimpers and fifteen for commercial fishermen. Also, Deehan noted that the EDA grant and the lease specified commercial shrimpers and commercial fishermen as users and did not refer to recreational fishermen.

Construction proceeded. A new dock was built. An existing dock was repaired. A building was constructed to house business affairs of fishermen. Space was provided for a restaurant, space for processing fish, arrangements for fuel and ice, and parking space for trucks. Arrangements were made for thirty slips, fifteen for shrimpers and fifteen for longline fishermen. The total cost of completion was approximately $10,000,000.

As the summer wore on the Mayor received numerous protests against plans for the Maritime Center. A new issue that surfaced was whether, if longline vessels were not permitted to dock, the City would be

required to repay to the government the EDA grant of federal funds.

On May 28, 1997, PRC terminated arrangements with AFB. AFB contends that it had a contract with PRC and had begun performance of some of the operations at the Center even though no agreement had been signed. The City says no agreement had been reached.

On June 12, 1997, in reply to a letter from a constituent, the Mayor said that the three major purposes of the Center were:

> – provisions for a long-term home for the commercial shrimping and fishing industry;
>
> – offering a pier for special events such as sailing races, fishing tournaments, docking for visiting tall ships and;
>
> – providing the public with more access to the harbor via the waterfront park, promenade and public pier.

App. at 303-04. The Mayor said that a new request for a proposal for an operator had been reworked with the help of a state agency. And he went on to say:

> The new request for proposals is set up to encourage "fishery friendly" proposals, requires that all proposals operate within federal and state laws and requires that at least 50 percent of the pier be dedicated to shrimpers. . . . The EDA grant which funded the commercial pier requires that the facility be developed to support the commercial fishing industry.

App. at 303-04.

The new request for proposals was distributed. It did not refer to limiting or restricting longline vessels from operating out of the Maritime Center. It stated that it did not intend to attract new fishing pressure to waters off South Carolina and that it limited commercial fishing vessels to fifty percent of the total slips.

On July 17, 1997 the City revealed a fundamental change in its position. The Mayor held a meeting in his office at which one or more representatives of RFA were present. He explained that originally he had not been familiar with longline fishing but had learned of the harmful consequences it created; therefore, he was changing sides and would support the recreational fishermen. On or about that time the City Council authorized the Mayor to cancel the contract with PRC as

primary lessee and to enter into a month-to-month contract with an operator.

On July 24, 1997 the AFB group, joined by longline fishermen and their vessels, filed an anti-trust suit in the United States District Court for South Carolina against RFA and Carolina Harbor Partners (CHP), a group composed of persons who wished their group to be selected as operator of the Maritime Center but whose response to the request for proposals had been rejected as untimely. The Plaintiffs alleged a conspiracy between RFA and CHP, restraint of trade, and interference with competition in violation of the Sherman Act, 15 U.S.C. § 1, and § 39-3-10 of the South Carolina Code of Law. They also alleged related state claims of interference with a contract or a prospective contract and defamation. The City was not a party.

The district court decided the anti-trust case in June 1999. It granted summary judgment to RFA on all claims, holding that RFA was exempt from anti-trust activity under the *Noerr-Pennington* doctrine. *See Eastern R.R. Presidents Conference v. Noerr Motor Freight, 365* U.S. 127 (1961); *see also United Mine Workers of Am. v. Pennington,* 381 U.S. 657 (1965). Plaintiffs appealed. That case is pending before this court as No. 99-2186 and is decided contemporaneously with the present case.

The plaintiffs in the anti-trust case brought another suit in state court against the City and CHP, alleging breach of contract and tort claims. We are informed that it has been dismissed.

The Maritime Center opened for business on September 1, 1997. According to the City, based on information and belief, prospective operators of the Maritime Center had not responded to a request for proposals for an operator because they feared that the defendants and others similarly situated would seek to enjoin operation of the Maritime Center as long as longliners were not permitted to participate.

In early October 1997 the Mayor took part in a radio show. He was asked about the anti-trust suit against the City and whether barring longline vessels from the Center was a penalty against a legal industry. He responded:

> Mayor: It is a legal industry. . . . . I didn't know what longline fishing was until about 5 or 6 months ago, but we indicate that the practice of longline fishing is threatening a resource and we felt after becoming familiar with this that the appropriate road for the City should be to support reasonable conservation measures and I am very comfortable with our decision.

App. at 302.

Asked whether longline vessels would be able to tie up at the Maritime Center the Mayor responded:

> We felt that after, you know, worrying about it, that we shouldn't use a pubic [sic] facility in a manner that could increase pressures on the resource and that we have came to fear that if we allowed longlining that could bring more longliners into the area, which meant more longlining off of our coast. And I became to understand that that was wrong and the reason we are not allowing the sale of swordfish is that swordfish, almost all swordfish that you catch is caught by the longlining method and we felt that we had to be intellectual [sic] honest if we would not having [sic] longliners tie up and use the facility, then we shouldn't sell swordfish either.
>
> * * *
>
> They [longline vessels] could tie up long enough to get fuel and ice. We felt that that was something that constitutionally we couldn't refuse to provide them, but that we felt that we legally could refuse to allow

> them to use it for their of [sic] practice. And there are private docks in the region that serve longliners, so its not like our action keeps longliners from operating if we didn't felt [sic] we should do it.

App. at 302.

The resolution was adopted July 21, 1998, on motion of the Mayor, one year after he announced that the City would support recreational interests and ten months after the improved Center opened. On November 12, 1998 the City filed this suit in South Carolina state court against A Fisherman's Best, Inc., and AFB of Charleston, Inc., seeking a declaratory judgment that the resolution and the City's operation of the Maritime Center pursuant to the resolution violated neither the federal nor the state constitution nor any law federal or state. The City alleged that it was entitled to lease the Maritime Center, as directed by the resolution, under the Home Rule provisions of Article VIII of the South Carolina Constitution and South Carolina Code Ann. § 5-7-10, *et seq.*, the Home Rule Act. The City alleged that it had undertaken development of a proposed facility that would encompass a commercial facility for shrimping and fishing, docks for seafood packaging and shipping, and a wholesale and/or retail seafood market. It alleged that development of the Maritime Center was part of an ongoing plan of development for the City waterfront and

that use of the Maritime Center facilities was inconsistent with the environmental and educational goals of the City and of the nearby aquarium. It alleged on information and belief that prospective operators of the Center did not bid because they feared they would be sued by longliners who would seek to enjoin the operation of the Center as long as longliners were not permitted to participate.

Ivan Miller and Tri Liner, a fishing vessel, intervened as defendants and removed the case to the United States District Court for South Carolina. The defendants alleged in their answer that the City's resolution and implementation thereof is preempted by federal law, 16 U.S.C. § 1801 *et seq.*, the Magnuson Fishery and Conservation Act. They alleged that the resolution and implementation thereof violate the United States Constitution, the Supremacy Clause, the Due Process Clause, the Equal Protection Clause, and the Commerce Clause as well as the Constitution of the State of South Carolina. They further asserted that the resolution is arbitrary and outside the scope of the Home Rule Act and was not passed in accordance with the City's regulations and procedures. They admitted that "they will seek to enjoin any attempt by the City to use the commercial fishing facilities at the Maritime Center in any way that excludes longline fishing or any other legal method of fishing." App. at 15. After a hearing, the

district court granted summary judgment to the City on all issues. The defendants appealed; we reverse.

II. *Structure of the Federal Management System*

The system for managing fish and fisheries began with the Magnuson Fishery Conservation and Management Act, enacted in 1976. The Act is carried forward as Chapter 38 of Title 16 of the United States Code, §§ 1801-1883. Regulations governing fish and fisheries appear in 50 C.F.R., Chapter VI, §§ 600-697 (1960), which contains more than 700 pages and includes hundreds, if not thousands, of regulations relating to fish and fisheries.

Regional councils representing geographical areas are key bodies—planners, expediters, enforcers and liaison agencies. The Secretary of Commerce has authority over any HMS fishery located within the geographical area of several councils, including the South Atlantic Council, of which South Carolina is a member. A council must prepare and submit a proposed FMP for consideration and approval by the Secretary of Commerce, except that the Secretary files a plan for an HMS fishery for which he is responsible. An FMP must include specified standard provisions, § 1852(B)(a), and it may include discretionary provisions as well. The FMP becomes a guidebook for all fishermen who fish within

the designated borders of the Council (or the Secretary's designated area).

Statutes of the United States have brought actions of international bodies into our country's regulatory system for fish. The United States is authorized to participate in international agreements, § 1821, and the Secretary of State is authorized to negotiate and renegotiate them. § 1822. Agreements concerning HMS are specifically authorized. *See* § 1822(e).

The United States is a member of the International Convention for the Conservation of Atlantic Tunas (ICCAT), a multi-national cooperative management body consisting of more than twenty nations. The convention meets annually to review and revise scientific and catch information for various species of fish including swordfish. An important task is recommending quotas for fish allocated to each member nation.

Congress has implemented ICCAT by the Atlantic Tunas Convention Act, § 971 (ACTA). The United States receives reports and recommendations of ICCAT and accepts or rejects them. If recommendations are accepted, regulations are promulgated to carry them out. This source of regulations is important because swordfish are an international fish, an HMS, in which many nations have interests and assert rights. Many provisions of the United States regulatory system for swordfish have

soriginated in ICCAT and through United States statutory procedures have been adopted as part of the federal regulatory system. These include such matters as size, mortality, quotas, allowable catch, and sanctions to enforce quotas.

III. *Preemption: An Overview*

The Supremacy Clause, Article VI, Clause 2 of the Constitution provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby; any Thing in the constitution or Laws of any State to the Contrary notwithstanding.

Preemption concerns allocation of power between state and federal action, that is, whether state law conflicts with valid federal law.

Federal law that may give rise to preemption may be the Constitution itself, or a valid act of Congress fairly interpreted. *McDermott v. State of Wisc.*, 228 U.S. 115, 132 (1913); *Savage v. Jones*, 225 U.S. 501, 533 (1912).

Regulations duly promulgated by a federal agency pursuant to a Congressional delegation have the same preemptive effect as a legislative enactment. *Hilisborough County, Fla. v. Automated Med. Labs.*, 471 U.S. 707, 713 (1985). A fishery management plan created pursuant to federal law may preempt.

The issue before us is not whether this court favors the commercial fishing industry, particularly longline swordfish fishing, or favors recreational fishermen and environmentalists and the policies they favor. Rather we must determine whether state action, in the form of the City's resolution, interferes with or is contrary to the laws of Congress, made in pursuance of the Constitution. *Wisconsin Pub. Intervenor v. Martiner*, 501 U.S. 597, 604 (1991).

The ultimate touchstone of preemption analysis is the intent of Congress. *Malone v. White Motor Corp.*, 435 U.S. 497, 504 (1978). One of the most familiar recitals is that federal and state law conflict when "the state law stands as an obstacle to the accomplishments of the full purposes and objectives" of federal law. *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984).

There may be express preemption where Congress in express terms has declared its intention to preclude state regulation in a given area. Neither party contends that there is express Congressional intent in this case.

Implied preemption occurs where Congress, through the structure or objectives of federal law, has impliedly precluded state regulation in the area. State action may be in direct conflict with federal law, which is most quickly apparent when the federal and state enactments are directly contradictory on theft faces. But state and federal laws need not be contradictory on their faces for federal laws to supercede. State action may be struck down even if it does not prohibit the very act that federal law requires. It may be struck down if it is in "actual conflict" with precise and sufficiently narrow objectives that underlie the federal enactments. Also, federal and state law conflict when it is impossible to comply with both state and federal law. Direct conflict may be implied. Conflict preemption may occur when Congress did not necessarily intend preemption of state regulation in a given area but the particular state law conflicts directly with federal law or stands as an obstacle to the accomplishment of federal objectives. *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190, 203-04 (1983).

Field preemption may occur when the federal scheme of regulation of a defined field is so pervasive that Congress must have intended to leave no room for the states to supplement it:

> [W]here a multiplicity of federal statutes or regulations govern and densely criss-cross

> a given field, the pervasiveness of such federal laws will help to sustain a conclusion that Congress intended to exercise exclusive control over the subject matter.

Laurence H. Tribe, *American Constitutional Law*, § 6-31, at 1206-07, *citing Amalgamated Ass'n of Street, Elec. Ry. & Motor Coach Employees of Am. v. Lockridge*, 403 U.S. 274, 296 (1971), at fn. 13.

The present case is a paradigm of multiple statutes and regulations, and varying governmental institutions, pervasive in depth, breadth and detail, in a regulatory system that Congress intends to be national in character. The system has been described as being as tightly regulated as atomic energy. The Eleventh Circuit has said that the legislative history of the Magnuson Act preempts the entire field of fishery management of the EEZ. *Southeastern Fishery Ass'n, Inc. v. Chiles*, 979 F.2d 1504, 1509 (11th Cir. 1992). Whether holding or dictum is not clear.

IV. *The Ruling of the District Court*

The district court erred in granting summary judgment based on the existence of "other landing spots." The court correctly set out that not all regulation concerning the fishing industry is preempted by the

Magnuson Act. It then turned to whether state action is preempted in this case. It noted in a single sentence that an FMP was in effect in the EEZ off the coast of South Carolina (presumably not the new FMP adopted three weeks earlier). It noted that the resolution did not set a number of fish or of poundage for a catch. The only reach of the resolution, the court held, was to deny every longliner access to the Maritime Center as a place to land its fish. But the court found longliners are not prohibited from landing their catch in any place other than the Maritime Center and they continue to fish off the coast of South Carolina and land their catch in South Carolina—"they just use other landing spots." This limited effect on longliners was insufficient, the court held, to raise a material issue of fact concerning conflict between federal law and state law—i.e., there was no conflict over denial of landing places because everybody could find a landing place. This analysis is plainly erroneous as a matter of fact and incorrect as a matter of law.

The finding that no one is harmed because everybody can find a landing spot somewhere is inconsistent with the finding of experts who had been employed by the City to appraise the most critical need of the commercial fishing industry of Charleston and had found that the need was space for vessels to dock and to secure related services.

One of the expert planners testified that there was no other deep-water port within 100 miles of the Maritime Center serving transient vessels. Evidence described the Maritime Center dock as superior in quality because of its access to a deep-water channel. The court mentioned Shem Creek nearby but noted that it was scheduled to close, and it did close during the pendency of this case.

Landing rights embrace more than a dock at which to unload the catch. The existence of "other spots" and "other landing places" does not establish that they met the need for landing facilities. Names in the record refer to several "landing places," or places having unloading docks. Two places were said to be located in the same county as the Maritime Center. Distances of others from open waters were not indicated. And it was not shown that any one or more of these landing places has comparable or otherwise adequate facilities like those at the Maritime Center or at other full service docks, such as assistance in unloading, fuel, refrigeration, communication, agents on hand to buy cargo at the site, facilities selling food and other expendable items needed for another voyage, safety from storms, deep enough water for safe approach, truck transportation for purchasers to move fish purchased, adequate parking spaces, facilities for processing, and the like. The availability of "one stop service" is important for saltwater fishing vessels. They need to dock, unload

promptly, dispose of their cargo, refuel, buy supplies and head back to sea.

There is no substantial evidence to support the conclusion that the need for landing places is met by merely naming other sites where one may unload.

One who unloads his swordfish at another "landing spot" that lacks refrigeration, storage, marketing, processing and handling could not take his cargo to the Maritime Center to meet these needs, since paragraphs 2 and 3 of the resolution would not permit him to unload at the Center or to have the cargo handled or processed or sold there.

V. *The 1996 Act: A New FMP and New Regulations*

Before 1996 management of HMS had been implemented by FMPs covering them and other species jointly.

The 1996 Congress added significant provisions to the system of managing fish and fisheries. It readopted the Magnuson-Stevens Act. It adopted a new system governing identification, testing and approval of fishing gear, now appearing in § 1855 *et seq.*, P.L. 104-297, 539 (1996). The Secretary of Commerce was directed to complete a comprehensive study on the feasibility of implementing a comprehensive management program

for HMS participating in fisheries for Atlantic HMS, which included swordfish. § 109(H), Pub. Law, 104-297, *as amended,* Pub. Law 104-108. Waters off South Carolina are within this specially directed fishery to be studied by the Secretary.

A panel was appointed under the authority of the Magnuson-Stevens Act and ATCA. It included representatives of academic organizations, regional councils involved in HMS management, Atlantic and Gulf Coastal States, and ICCAT. The panel met seven times. National Marine and Fisheries Service (NMFS), an agency of the Commerce Department, distributed a scoping document to serve as a starting point for consideration of issues. It described major issues, including legal requirements for management and potential management measures. This document was the subject of public hearings and provided a mechanism for public input.

A draft FMP was circulated in October 1998 with a comment period to end on March 12, 1999. A copy of this draft is in the record of this case, but the district court did not refer to it at the summary judgment hearing or in its order.

A proposed rule that accompanied the draft FMP was published in the Federal Register on January 20, 1999. After the comment period expired on March 12,

1999 NMFS held more than twenty public hearings in communities from Texas to Maine and the Caribbean. An Executive Summary of the proposed FMP was issued in early April which listed fishing proposed for approval for North Atlantic swordfish. It said:

> *The U.S. directed fishery for north Atlantic swordfish is confined by regulation to two gear types: longline and handgear. Pelagic longlining accounts for approximately 98 per cent of U.S. directed swordfish landings.*

Executive Summary, Final Fishery Management Plan for Atlantic Tuna, Swordfish and Sharks, April 1999, p. 45[2] (Emphasis added.)

A formal rule approving the FMP and regulations implementing it was issued May 28, 1999, less than thirty days before the district court decision was entered in this case on June 22, 1999. It is styled "Fishing Management Plan for Atlantic Tuna, Swordfish and Sharks." It is not in the record and the district court did not refer to it. We take judicial notice of it, however, even if it was not

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[2]Including handgear as a permitted gear type is of little significance. It is used primarily by recreational fishermen and accounts for only a nominal percentage of swordfish catches.

called to the attention of the trial court. 444 U.S.C. § 1507. *See also Golding v. United States*, 219 F.2d 109 (4th Cir. 1955); *Glapion v. MS Journalists*, 487 F.2d 1252 (5th Cir. 1973). The new FFP became effective July 1, 1999, except for a few regulations that do not relate to this case. Formal adoption on May 28 was sufficient to subject the FMP and accompanying regulations to judicial consideration.

The new FMP described the provisions of the 1996 Act:

> In 1996, the United States Congress reauthorized the Magnuson-Stevens Act. This reauthorization included a new emphasis on the precautionary approach in U.S. fishery management policy. New provisions of the Magnuson-Stevens Act require managers to halt overfishing; to rebuild overfished fisheries; to minimize bycatch and bycatch mortality, to the extent practicable; and to identify and protect essential fish habitat (EFH). These provisions are coupled with the recognition that management of HMS requires international cooperation and that rebuilding programs must reflect traditional participation in the fisheries by U.S. fishermen, relative to foreign fleets. Besides the Magnuson-Stevens Act, U.S.

> fisheries management must be consistent with the requirements of other regulations including the Marine Mammal Protection Act, the Endangered Species Act, the Migratory Bird Treaty Act, and several other Federal laws. These laws are described in Chapter 1 of this document. This FMP addresses these new requirements, as well as the requirements of other applicable legislation, and incorporates the best available scientific information into Atlantic HMS management.

Final Fishery Management Plan for Atlantic Tuna, Swordfish, and Sharks, April 1999, p. viii.

The FMP described the area from the Florida east coast north to Cape Hatteras (off North Carolina) as a sector in which pelagic longline vessels primarily target swordfish year round. And, it said, smaller swordfish vessels make trips from the Florida Straits (the south tip of Florida) to the Charleston Hump (an area in the waters off South Carolina), while larger vessels migrate seasonally from the Yucatan Peninsula to the West Indies in the Caribbean and as far north as the mid-Atlantic coast of the United States.

The objectives of the new FMP reflect the complex balancing of interests and concerns that culminated in the 1999 final rule. Among the aims of the new FMP were establishing a foundation for the development of international rebuilding programs, analyzing and implementing management measurements to control bycatch, minimizing social and economic impact to meet the goals of the FMP and the Act, rebuilding overfished fisheries, and bringing about changes that meet the same objectives but with lesser impact on affected communities.

As a consequence of the 1996 Act the federal government began working on a system of closed areas to reduce pelagic longline catch of undersized swordfish, with substantial focus on fishing grounds off the coast of South Carolina.

VI. *Preemption Applied*

The resolution conflicts in numerous ways with federal laws and, therefore, is preempted.

At the threshold of consideration, it is evident that the resolution is preempted by duly enacted regulations of an authorized federal agency. The resolution forbids access to a vessel utilizing longline tackle. This conflicts on its face with at least three of the regulations adopted

May 28, 1999 by the Atlantic Tunas, Swordfish and Sharks FMP that require longline tackle.

Under "General prohibitions" of Fishery Conservation and Management, 50 C.F.R. § 600.725 at 80 (1999), the Secretary of Commerce designated "longline" as the only authorized gear for the Atlantic pelagic longline fishery. Subsection (v) of § 600.725 forbade the use of any gear or participation not on the list of authorized fisheries and gear. It provides:

> (v) The use of any gear or participation in a fishery not on the following list of authorized fisheries and gear is prohibited after July 26, 1999. A fish, whether targeted or not, may be retained only if it is taken within a listed fishery, is taken with a gear authorized for that fishery, and is taken in conformance with all other applicable regulations. Listed gear can only be used in a manner that is consistent with existing laws or regulations. The list of fisheries and allowable gear does not, in any way, alter or supersede any definitions or regulations contained elsewhere in this chapter. A person or vessel is prohibited from engaging in fishing or employing fishing gear when such fishing or gear is prohibited or restricted by regulation

> under an FMP or under other applicable law.

Id. at 76.

Subparagraph (k) of § 600.725 refers to fishing in violation of the Magnuson-Stevens Act. It provides:

> (k) [It is unlawful to] Fish in violation of the terms or conditions of any permit or authorization issued under the Magnuson-Stevens Act or any other statute administered by NOAA [National Oceanic and Atmospheric Administration].

Id. at 75.

Subsection (a) of 600.725 makes unlawful many acts done in violation of the Magnuson-Stevens Act and/or any regulation or permit issued under the Act:

> It is unlawful for any person to . . . [p]ossess, have custody or control of, ship, transport, offer for sale, sell, purchase, land, import, or export, any fish or parts thereof taken or retained in violation of the Magnuson-Stevens Act or any other statute administered by NPAA and/or any

regulation or permit issued under the Magnuson-Stevens Act.

Part 635 of the Code of Federal Regulation covers Atlantic Highly Migratory Species. Section 635.21 covers gear operation and deployment restrictions. Subsection (b) provides:

> *General.* No person shall use any gear to fish for Atlantic HMS other than those gears specifically authorized in this part. A vessel using or having on board in the Atlantic Ocean any unauthorized gear may not have on board an Atlantic HMS.

The gear specifically authorized for swordfish appears in (d)(4):

> *Swordfish.* (i) No person may possess north Atlantic swordfish taken from its management unit by any gear other than handgear or longline, except that such swordfish taken incidentally while fishing with a squid trawl may be retained, subject to restrictions specified in § 635.24(b)(2). No person may possess south Atlantic swordfish taken from its management unit by any gear other than longline.

The resolution also conflicts with Prohibitions under 50 C.F.R. § 635.71. Subsection (e), headed "Swordfish," makes it unlawful to fish for North Atlantic swordfish from, or possess or land North Atlantic swordfish, on board a vessel using or having on board gear other than pelagic longline, harpoon, rod and reel, or handline.[3] *Id.* at 223.

The forces that were directed by Congress to prepare an FMP for HMS in the Atlantic had responded. They had gathered thousands of views[4] through hearings and responses and submissions by experts and state and government agents. They had distributed their views as required by administrative procedures. They had concluded with a choice of tackle for swordfish. The City, pursuing its own interests and goals, had made its own choice, diametrically opposed, for fishing tackle and,

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[3]Including harpoon, rod and reel and handline in the listing of permissible gear has no practical consequences to this case. "Harpoon" was described by an expert witness in this case as "dead." Rod and reel and handline are largely used by recreational fisheries. These tackles other than longline account for less than five percent of the total catch of swordfish.

[4]More than 5,000 suggestions had been received.

indirectly for fishing vessels condemned by their use of gear of which the City disapproved. Compliance with its requirements would violate the law.

A hearing on motion for summary judgment was conducted June 22, 1999, eleven months after the City had adopted its resolution and three weeks after the new FMP had been approved. The transcript of the hearing contains no mention of the new FMP or new regulations.

In additional ways not so apparent as the direct facial conflict with the new regulations, the resolution conflicts with the national management of fish and fisheries. The record tells the story. Motive or purpose for action may be relevant in determining whether preemption applies. *Building & Construction Trades Council v. Associated Builders & Contractors of Massachusetts*, 507 U.S. 218, 228-29 (1993). The mayor's statements, correspondence with citizens, his radio address, and his testimony in his deposition show that actions by the City were intended to limit or terminate longline fishing for swordfish in the Charleston area. The mayor explained the view of citizens and the City that the City should not spend money on a facility for longline vessels, the view that most of the damages from by-catch are done by longline fishing and that overfishing is the fault of longline fishermen. He expressed the view that federal control should be displaced because local citizens wanted it displaced, and

that longline vessels should not berth at the Maritime Center. The record shows how a narrow, limited local issue of whether longline vessels could tie up at the Maritime Center expanded and proliferated into numerous industry-wide issues involving the swordfish industry in waters off South Carolina and non-local vessels that wished to come there to fish.

The record of the issues is revealing, for the resolution extends to the jobs of dock workers forbidden to handle swordfish and even to barring all swordfish from the dock, wherever caught and by whatever tackle.

The conflicts between federal and state law are many. These are a few of them. Congress had found that a national program for the conservation and management of fishing resources is necessary. § 1801 (a)(6). It declared its purposes to provide for the preparation and implementation, in accordance with national standards, of fishery management plans, § 1801 (b)(4), and its intention to establish fishery management councils, § 1801 (b)(5). In § 1851(a) Congress promulgated mandatory national standards with which any FMP must be consistent, and in § 1853(a) it designated matters that must be included in any FMP. In § 1853(b) it set out discretionary provisions that may be included in any FMP. The City's resolution, enacted by a single city council and relating to a single limited coastal area, attempted to impose standards for longline swordfish

vessels and tackle in the area. The resolution conflicted with the above-cited Congressional determinations and therefore is preempted.

Paragraph 3 of the City's resolution undercuts the finding by Congress in § 1801(a) that fish off the coast of the United States and the highly migratory species of the high seas constitute valuable and renewable natural resources that contribute to the food supply, economy and health of the nation.

By § 1811(a) the United States claims, and expresses its intention to exercise, sovereign rights and exclusive fishery management authority over all fish within the Exclusive Economic Zone. The City's resolution attempts to exercise authority over fishing vessels that wish to tie up at the City's Maritime Center facilities, which includes the longline swordfish vessels who make over 95 percent of the swordfish catch in the EEZ. This undercuts the claims of the United States under § 1811(a) and the assertion of management authority over fish within the EEZ.

Under § 1853(b) a fishery management plan may designate zones where, and periods when, fishing shall be limited, or shall not be permitted, or shall be permitted only by specified types of vessels or with specified types and quantities of fishing gear. And the FMP may establish specified limitations for catch, sale of

fish, transhipment of fish or fish products; and it may prohibit, limit, condition or require the use of specified types and quantities of fishing gear. The action of the City conflicts with the authority of the Secretary of Commerce, or any council preparing an FMP, to designate specified types of fishing vessels and specified types and quantities of fishing gear and to prohibit, limit, condition or require the use of specified types and quantities of gear.

Section 1812 requires the United States to cooperate with nations involved with fisheries for HMS with a view to ensuring conservation within the EEZ. Under § 1822(a)(4)(B) the Secretary of State is required to initiate and conduct negotiations that provide for the conservation and management of HMS. Under § 1822(e) the Secretary of State must evaluate the effectiveness of international agreements that pertain to fishing for HMS. The resolution undercuts these responsibilities.

The City intended the resolution to be an obstacle. Utilization of longline tackle by a vessel was a means to deny access to the docks by longline vessels, and denial of access was a means to control or limit the swordfish industry in waters off South Carolina and to discourage non-local vessels from coming to fish in those waters. The City's opposition was directed at the industry.

VII. *Alleged Barriers To Preemption*

The City presents several barriers to preemption. First, it says that it is not engaged in regulating anything but if it is regulating anything it is not regulating fish, therefore there is no issue of whether federal fishing law preempts state action. Along with this it describes its resolution as a mere announcement of a policy that longline vessels are not welcome at its dock, that, like a private landowner, it has the right to announce what persons are welcome, to ask those not welcome to leave, and to pursue a remedy of trespass if they refuse. The City asks for the status of a private landowner. The government grant it secured was to meet needs of a state or local area from economic adjustment problems, and the only entities that could secure such grants were a "redevelopment area or economic development district established under subchapter IV of this chapter, an Indian tribe, a State, a city or other political subdivision of a State, or a consortium of such political subdivisions." 42 U.S.C. § 3242 (repealed 1998).

The content of the regulation is not a mere announcement. Paragraphs 1 and 2 are prohibitions, full-blown commands, and paragraph 3 contains a statement of what shall be done. The resolution is directed at specific targets, and it calls on the class to whom it is addressed to conform to specific practice. The City

acknowledges that it will pursue a remedy of trespass if needed.

The City's complaint recognizes that the resolution is not a mere statement of how it feels about longline vessels. It alleges that it is entitled to lease the Maritime Center "for operation *as directed by the resolution.*" The characterizations of the controversy as a real estate matter, relating only to land-based activities, and not regulating fish or anything else, are mischaracterizations, little more than a play on words.

The second barrier alleged is that, as a matter of law, the state has exclusive jurisdiction over state waters, and its resolution is a restraint on only vessels in state waters, therefore there is no issue of federal preemption. But where there is an FMP in effect and the cargo consists of fish that have been caught in federal waters the fisherman is entitled to access to landing facilities to land his catch. *Southeastern Fisheries Ass'n Inc. v. Mosbacher,* 773 F. Supp. 434, 441 (D.D.C. 1991); *Bateman v. Gardner,* 716 F. Supp. 595, 598 (S.D. Fla. 1989), *aff'd,* 922 F.2d 847 (11th Cir. 1990), *cert. denied,* 500 U.S. 932 (1991); *State v. Sterling,* 448 A.2d 785-787 (R.I. 1982); *see also People v. Weeren,* 607 P.2d 1279, 1283 (Cal. 1980). In *Louisiana Seafood Management Council, Inc. v. Foster,* 917 F. Supp. 439 (E.D. La. 1996), the court upheld a restriction imposed by Louisiana that limited the catching or landing to certain

fish in Louisiana waters. But there was no FMP. The matter is articulated neatly in *Mosbacher:*

> Because at least four of the five Gulf states prohibit or restrict landing, possession, or sale of redfish, the state laws conflict with the federally imposed quota. Defendants, in effect, have told commercial fishermen that they may catch the fish, but that they may not land them. This makes no sense, and creates a conflict that is impermissible under the MFCA. Defendants' and intervenors' arguments to the contrary are wholly unpersuasive.

733 F. Supp. at 440.

When an FMP is in effect and a fisherman has harvested fish in federal waters and is headed for shore to land his cargo, the state cannot exercise its authority over state waters for the purpose or effect of preventing him from landing at an available facility. Federal and state authority is in conflict and the Supremacy Clause requires that the federal law prevails. The Congressional policy of commitment to a national regulatory system is honored. Congress does not intend Balkanization of our coastlines. Were this not so a state or municipal sovereign owning a dock can effectively bring to its knees an industry engaged in bringing ashore fish caught in

federal waters—Boston could shut down codfishing and a California seaport can idle the tuna fleet.

The third barrier concerns § 1856. It is not a basis on which plaintiff can escape judicial inquiry into the issue of preemption. Plaintiff has chosen the forum and the remedy. It seeks a declaration that preemption does not apply to this case. It has chosen the party defendant (and others have intervened) and the defendants are called on to answer. Now, in this appeal, the City asserts that the defendants cannot answer.

Section 1856(b) describes administrative procedure by which a Secretary of Commerce can "assume responsibility" for the regulation of a fishery in state waters. We need not set out here the full procedures that the Secretary must follow. After a hearing the Secretary must make two findings of fact that are jurisdictional in the sense that they are prerequisites to his proceeding further. The Secretary must find that the fishing in question is in a fishery which is covered by an FMP implemented under the Magnuson-Stevens Act and that it is engaged in predominately within the EEZ and beyond; and, second, the state must have taken action or omitted to take action the results of which will substantially and adversely affect the carrying out of the FMP. The regulations, § 600.605-610 set out factors that may be considered in determining whether fishing is engaged in "predominately" within or beyond the EEZ

and whether relevant effects "are substantial." The City asserts in its brief (Appellee Br. p. 19) "the alleged 'regulation' [in this case] does not substantially and adversely effect [sic] the carrying out of a fishery management plan." The City seeks a declaration that its operations are legal. The defendants say that the question of validity is preempted. The City says "you can't bring up preemption, only the Secretary can because he could commence administrative proceedings that would give him sole authority." At the same time the City says "under the facts in this case the Secretary can't acquire authority in this matter." The City may not avoid preemption in this manner.

In numerous cases since 1976, when § 1856(b) was enacted, preemption has been asserted, and considered by the court with no indication that the only entity that could raise the issue was the Secretary of Commerce. *See Louisiana Seafood Mgmt. Council, Inc. v. Foster,* 917 F. Supp. 439 (N.D. La. 1996); *Mosbacher,* 733 F. Supp. at 435; *Vietnamese Fishermen Ass'n of Am. v. California Dept. of Fish & Game,* 816 F. Supp. 1468 (N.D. Cal. 1993); *Southeastern Fisheries Ass'n v. Martinez,* 772 F. Supp. 1263 (S.D. Fla. 1991); *see, e.g., Livings v. Davis,* 465 So.2d 507 (Fla. 1985); *State v. Sterling,* 448 A.2d 785 (R.I. 1982).

If the issue is considered as one of standing to assert that the resolution is preempted, the defendants meet the requirements of 16 U.S.C. § 1856(b). They have

demonstrated that (1) there is an injury in fact, (2) causation and (3) redressabiity. *See* Laurence Tribe, *American Constitutional Law,* § 3-14, at 386 (3d ed. 2000).[5]

The next defense concerns the "proprietary capacity exception," which, in some circumstances, may be invoked by the sovereign when it acts as owner rather than as regulator. Almost all of the cases involving the issue of preemption arise under the Commerce Clause. The district court did not directly discuss whether there is a "proprietary capacity exception" under the Magnuson Act that would provide the shelter that it seeks. The court did not reach that issue, however, because it held that the ban on landings at the Maritime Center was not sufficient regulation to raise a material disputed issue of fact that

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[5]In *Maryland Pest Control Ass'n v. Montgomery County, Maryland,* 884 F.2d 160 (4th Cir. 1989), this court held that the federal preemption of local ordinances pursuant to the Supremacy Clause is not actionable under 29 U.S.C. § 1983, therefore that section does not support an award of attorney's fees under § 1998. The defendants in this case do not assert a § 1983 claim based on preemption. They are defendants in a declaratory judgment suit which asserts that preemption does not apply and are called on to affirm or deny whether that allegation is correct.

would prevent summary judgment. In this court we have held that the summary judgment was not appropriate, so we must address the "proprietary capacity exception" issue. But, before we can determine whether the City's resolution is preempted by the Act we first determine whether there is such an exception to the Magnuson Act.

In *Cardinal Towing & Auto Repair, Inc. v. City of Beford*, 180 F.3d 686, 694 (5th Cir. 1999), the court explored whether preemption could apply to an ERISA case. ERISA states that it preempts any and all state laws so far "as they may now or hereafter relate to an employee benefit plan." State laws include "all laws, decisions, rules, regulations, or other State action having the effect of law, of any state." See 29 U.S.C. § 1144(c)(1). The court held that this definition of state laws does not include state action that does not have the effect of law. *See Cardinal Towing*, 180 F.3d at 694. Therefore the Fifth Circuit concluded that "the text of the statute allow[s] for the proprietary analysis." *See id.* Hence, ERISA expressly created a proprietary capacity exemption to the preemption doctrine.

In *Building & Construction Trades Council v. Associated Builders & Contractors of Massachusetts*, 507 U.S. 218 (1993), the Court looked to the goals behind the passage of §§ 8(e) and (f) of the NLRA to determine what Congress intended regarding the State and its relationship to the agreements authorized by the statute.

The Court concluded that "it is evident from the face of the statute that in enacting exemptions authorizing certain kinds of project labor agreements in the construction industry, Congress intended to accommodate conditions specific to that industry." *Id.* at 231. Furthermore, "there is no reason to expect these defining features of the construction industry to depend upon the public or private nature of the entity purchasing contracting services." *Id.* Therefore, "to the extent that a private purchaser may choose a contractor based upon that contractor's willingness to enter into a prehire agreement, a public entity as purchaser should be permitted to do the same." *Id.* Thus the court found that a proprietary exception was implicitly created by the statute.

We have examined the Magnuson Act. We find no explicit provision creating a proprietary exception and the City points to none. Nor does the City point to any basis for concluding that such an exception is implied.

The Magnuson Act lists seven purposes that include: (1) to conserve and manage the fisher resources found off the coasts of the United States; (2) to support and encourage the implementation and enforcement of international fishery agreements; (3) to promote domestic commercial and recreational fishing under sound conservation and management principles; (4) to provide for the preparation and implementation, in accordance

with national standards, of fishery management plans; (5) to establish Regional Fishery Management Councils to exercise sound judgment in the stewardship of fishery resources; (6) to encourage the development by the United States fishing industry of fisheries; and (7) to promote the protection of essential fish habitat. § 1801(b).

The City does not say that a proprietary exception maybe inferred from these purposes or from any other basis. Rather, it points to what it did as the predicate for existence of an exception. It refers to its passing a resolution as opposed to adopting an ordinance and it denies that it was intending to regulate fish (a denial we have rejected). This alleged state of mind does not appear to have been made known to the defendants, and it is inconsistent with the face of the resolution itself.

The City cannot lift itself by its bootstraps to create in the Magnuson Act, either facially or by implication, an exemption from judicial inquiry into whether its actions are free of accepted principles of preemption. We cannot say that Congress intended that a proprietary capacity exception such as that found in ERISA and the NLRA applies to the Magnuson Act, and we hold that Congress did not so intend.

Conclusion

The City's resolution of July 21, 1998 conflicts on its face with duly adopted regulations of the federal government and, therefore, must be held to be preempted.

The resolution conflicts with federal law in a panoply of other ways and must be held preempted.

We have considered the barriers to preemption suggested by the City. None has merit.

On the sole issue of preemption of the City's resolution by federal law the judgment of the district court is REVERSED and the case REMANDED with direction to enter a judgment in favor of defendants.[6]

REVERSED AND REMANDED

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[6]None of the defendants moved for summary judgment in the district court and in this court. This court, on appeal, has power to enter summary judgment for them. *Uzzell v. Friday*, 547 F.2d 801, 805 (4th Cir. 1977), *vacated on other grounds*, 438 U.S. 912 (1978); *Fabris v. Provident Life & Accident Ins. Co.*, 115 F.3d 908, 914-15 (11th Cir. 1997); Chas. Allen Wright, et al., *Federal Practice and Procedure*, § 2762 (3d Ed. 1998).

EXHIBIT A

NOTE: The material below comprises the text of Defendant's Exhibit 1, found at pages 162-164 of the joint appendix.

[seal]

A RESOLUTION TO AUTHORIZE THE MAYOR OF THE CITY OF CHARLESTON TO ENTER INTO MONTH TO MONTH LEASES FOR THE USE OF THE CHARLESTON MARITIME CENTER AND ITS APPURTENANT FACILITIES; TO PROHIBIT THE USE OF THE SAID CENTER AND ITS FACILITIES BY FISHING VESSELS THAT UTILIZE PELAGIC LONGLINE TACKLE; AND TO PROHIBIT THE SALE, PURCHASE, PROCESSING OR UNLOADING OF ANY FISH FROM OR CAUGHT BY PELAGIC LONGLINE FISHING VESSELS INCLUDING BUT NOT LIMITED TO BILLFISH AND SWORDFISH.

WHEREAS, the City Council of the City of Charleston makes the following findings of fact:

1. The waters of the City of Charleston are as much a part of its history and tradition as is its grand architecture. The geographic and economic growth of the City is, and has been, inextricably linked to its waterfront environment; and

2. Over the course of the last thirty (30) years, the City has made concerted efforts to protect its waterfront areas from environmentally insensitive uses, and has been steadfast in assuring and preserving for the public, access to, and use and enjoyment of, its waterfront. These efforts have included the acquisition of a 5 acre park on the western bank of the Ashley River; the acquisition of a 51 acre nature preserve along the shores of Church Creek; the acquisition and development of Brittlebank Park on the eastern bank of the Ashley River; the maintenance and improvement of White Point Gardens; the development of the 13 acre passive Waterfront Park along the western bank of the Cooper River; the acquisition of a 5 acre waterfront site on the Cooper River; and the construction of the South Carolina Aquarium, also on the Cooper River. The City has also been very successful in its effort to acquire land or necessary easements toward the goal of providing an uninterrupted pedestrian path along the water's edge from Brittlebank Park, to the Battery, to the Waterfront Park, to the South Carolina Aquarium, and

3. These efforts on the part of the City have been pursued to assure to the public perpetual access to the natural environment, and all efforts of the City in the development of these accesses has been undertaken in a manner sensitive to the environment, and in recognition of the importance of these areas to the heritage of the City and its citizens; and

4. As part of its continuing efforts to revitalize, preserve and make available to the public the water's edge, the City has constructed a Maritime Center on a portion of a 5 acre site on the Cooper River, immediately south of the Dockside Condominiums and the South Carolina Aquarium. The City's purpose in constructing the Maritime Center has been to provide a place for uses, both recreational and commercial, that are consistent with those traditionally and historically conducted on the City's waterfront. To this end, the Maritime Center will include a pier devoted to recreational events and a pier, with supporting facilities, devoted to foster the shrimping and fishing industry that has, historically, been a part of the City's waterfront environs; and

5. City Council has determined to solicit proposals for the operation of the portion of the Maritime Center that to serve this industry, and in doing so, finds it to be in the public interest, and in furtherance of its efforts to promote its waterfront, to require that this portion of the Maritime Center be operated and used in a manner traditional to such industry and to the City and consistent and compatible with the tenor of other City supported public uses along the waterfront, particularly the Aquarium to the north, and proposed Union Pier and the passive waterfront park to the south; and

6. The City encourages and promotes creativity in the use and operation of the commercial portion of the Maritime Center, but finds that such proposals must, to advance the City's goal, include elements that foster and enhance the public appeal, enhance the public understanding and appreciation of its delicate maritime resources, enhance the preservation of fisheries resources, discourage fish practices that result in wasteful loss of such resources, and include elements compatible and consistent with the educational and environmental mission of the South Carolina Aquarium and the waterfront park; and

7. City Council further finds that there has been much public debate over the past few months over the depletion of the ocean's fisheries, especially off the coast of South Carolina, and the effect the operation of the Maritime Center will have on these resources. City Council has followed the debate and is concerned that the operation of the Center furthers the goal of preservation of fisheries to the extent practicable, while also protecting the traditional shrimping and fishing industry in their traditional manner of gathering these resources. City Council further finds that pelagic longline fishing practices result in the loss of the great majority of fish caught, both to the consuming public and more importantly, to the fish population, and that such practices are the primary source of swordfish capture; and

8. City Council further finds that all billfish, including swordfish, are the most threatened of species caught off the coast of South Carolina and that it would be incompatible with the goals of the City in establishing the Maritime Center to allow the processing or sale of such species; therefore, no billfish nor swordfish shall be processed or sold at the Maritime Center.

NOW, THEREFORE, BE IT RESOLVED that the Mayor of the City of Charleston is hereby authorized to enter into month to month leases for the use of the Charleston Maritime Center and its appurtenant facilities.

NOW, THEREFORE, BE IT FURTHER RESOLVED that the use of the Charleston Maritime Center and its appurtenant facilities is hereby prohibited to fishing vessels utilizing pelagic longline tackle, which shall be prohibited from docking or tying up at the Charleston Maritime Center and its appurtenant facilities for any purpose other than to purchase fuel or ice or in the case of a storm or other emergency.

NOW, THEREFORE, BE IT FURTHER RESOLVED that any Lessee or user of any part of the Charleston Maritime Center and its appurtenant facilities shall be prohibited from selling, purchasing, processing or unloading any fish from or caught by pelagic longline fishing vessels.

NOW, THEREFORE, BE IT FURTHER RESOLVED that no billfish or swordfish from any source of any kind shall be sold, purchased, processed or unloaded at the Charleston Maritime Center and its appurtenant facilities.

NOW, THEREFORE, BE IT FURTHER RESOLVED that a copy of this Resolution shall be entered into the official Journal of City Council.

IN WITNESS WHEREOF, THE CITY COUNCIL OF CHARLESTON has caused these presents to be executed in its name by Joseph P. Riley, Jr., its Mayor and by Vanessa Turner-Maybank, its Clerk of Council, and its corporate seal to be hereto affixed this 21st day of July, 1998.

CITY COUNCIL OF CHARLESTON:

(SEAL)

/s/

Joseph P. Riley, Jr.
Mayor

ATTEST:

/s/
Vanessa Turner-Maybank
Clerk of Council

LUTTIG, Circuit Judge, dissenting:

I respectfully dissent from my colleagues' disposition of this case. There are two flaws with the majority's opinion. First, it assumes wrongly (with little analysis) that the municipal resolution under review constitutes government regulation, which is subject to preemption, rather than proprietary action of the municipality, which is not, *see ante* at 31, when it is clear that the City acted in the latter capacity when it passed the resolution in question. Second, even were the majority correct in its unexamined assumption that the resolution constitutes regulation as opposed to the exercise of proprietary power, the Magnuson Act does not preempt the resolution because this single jurisdiction's limitation of docking privileges at this single dock does not *actually* interfere with the activities protected by the Act.

As to the first flaw, "preemption doctrines apply only to state *regulation*. [The Supreme Court's] decisions in this area support the distinction between government as regulator and government as proprietor," *Building and*

Constr. Trades Council v. *Associated Builders and Contractors*, 507 U.S. 218, 227 (1993) (emphasis added). And, as the district court noted, "[w]hether or not a governmental entity is acting as a market participant is a very fact specific determination." J.A. at 345 (district court opinion). Here, the facts unequivocally demonstrate that the City was "a lessor of its property, [] participating in the economic marketplace for the provision of physical marketplaces." *Id.* at 350.

That the City's only remedy when longline fishing boats dock at the Maritime Center lies in trespass as the majority itself acknowledges, *see ante* at 31, confirms that the City acted in its proprietary capacity when it enacted the instant resolution: The resolution has no enforcement mechanism and gains force *only in so far as the City acts like a private landowner* and exercises private property rights that exist independently of the resolution. *Cf. SSC Corp.* v. *Town of Smithtown*, 66 F.3d 502, 512-13 (2nd Cir. 1995) (observing that the attachment of enforcement mechanisms to statutory command indicates that a state is regulating).

Simply, the resolution is a decision by the City, as a participant in the market, as to how it will manage its own property. The citizens weighed in, a legislative decision was made, and now, the City's land is to be managed in conformity with the democratically-derived directive. The only federal restraint imposed on the

conduct of a governmental entity acting in such a capacity is the *direct* command of federal law.

Even were the majority correct in its characterization of the resolution as regulatory in nature, the resolution would yet be valid because it does not interfere with activities protected by the Magnuson Act. As the district court held, this single resolution, of a single local jurisdiction, governing a single dock, does not interfere at all, much less significantly, with longline fishing. It does not even prevent longline fishermen from landing within this one City's jurisdiction.

Allowing individual municipalities to prevent longline fishermen from landing in their respective jurisdictions would allow municipalities to produce, piecemeal, conflict such as that held to be preempted in *Southeastern Fisheries Assoc. Inc.* v. *Chiles*, 979 F.2d 1504 (11th Cir. 1992). But when, as here, a municipality does not close its shores, no such piecemeal conflict is even possible. Not only may longline fishermen continue to dock elsewhere along the South Carolina coast, they may continue to dock in the City of Charleston itself—just not at the one dock reached by the resolution.

Appellants failed to contest the City's claims that there are other docks in Charleston Harbor (*i.e.*, also advantageously positioned with respect to being in a deep-water port), at which longline fishermen may dock,

unaffected by the resolution. *See* Appellee's Br. at 11-12. Alone, this failure is fatal to appellants' claim.

Appellants did offer testimony that in Charleston Harbor there is currently no other dock site presently complete with all of the services necessary for landing swordfish. *See* Appellants' Br. at 50-51. But none of that testimony creates a genuine issue of fact as to whether dock space that could be configured to land such fish is in fact rendered unavailable in Charleston Harbor by the resolution. In the absence of any evidence contradicting that offered by the City on this issue, the district court was certainly correct to grant summary judgment.

The "motive" of the City's officials in enacting the resolution is irrelevant to the actual conflict analysis. *Cf. ante* at 30. Though the majority relies on *Building and Constr. Trades Council*, 507 U.S. at 228-29, to say that motive *is* relevant, the Supreme Court there simply reviewed its analysis in *Wisconsin Dept. of Labor & Indus.* v. *Gould*, 475 U.S. 282, 287-88, in which it inquired into a statute's purpose *by examining the statute's operation*. *See id.* ("No other purpose could credibly be ascribed, given the rigid and undiscriminating manner in which the statute operates."). It did not hold that individual legislators' motive is relevant to whether state or municipal action is pre-empted by federal law.

Here, the only relevant inquiry is whether the resolution renders unavailable all, or substantially all, dock space within the City's jurisdiction that could be configured to allow longline fishermen to land their fish. Were this a case in which the municipality had, in some manner, actually prevented such landings, then the argument for preemption would indeed be strong. But this is academic at the moment, because nothing approaching the actual prevention of docking by these fishermen has occurred.

This resolution does not even regulate longline fishing, nor does it prohibit or effectively prohibit such fishing. It merely limits access to one, single municipal dock; other docks remain unaffected by the resolution. As such, there is neither need nor authorization for the heavy hand of federal preemption today sanctioned by the majority.

FILED
JUN 23 1999
LARRY W. PHOPES, CLERK
CHARLESTON, SC

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

City of Charleston, a municipal corporation, Plaintiff, v. A Fisherman's Best, Inc., AFB of Charleston Inc., Ivan Miller, and the Fishing Vessel Tri Liner, Defendants.	)	C.A. # 2:99-828 -23 ORDER

This matter is before the court upon the City's motion for summary judgment as to its claims for declaratory judgment regarding the municipal resolution passed on July 21, 1998. The Complaint seeks declaration of the legality of the City resolution passed on July 21,

1998 which provides that pelagic (relating to, or living in ocean waters as opposed to inland or near coastlines) longline fishing vessels shall be prohibited from docking or tying up at the Charleston Maritime Center other than to purchase fuel, ice or in the case of emergency. Further, no billfish or swordfish shall be sold, purchased, processed, or unloaded at the Maritime Center.[1] The

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[1]The actual language of the resolution states as follows:

> NOW, THEREFORE, BE IT FURTHER RESOLVED, that use of the Charleston Maritime Center and its appurtenant facilities is hereby prohibited to fishing vessels utilizing pelagic longline tackle, which shall be prohibited from docking or tying up at the Maritime Center and its appurtenant facilities for any purpose other than to purchase fuel or ice or in the case of a storm or other emergency.
>
> NOW, THEREFORE, BE IT FURTHER RESOLVED that any Lessee or user of any part of the Charleston Maritime Center and its appurtenant facilities shall be prohibited from selling, purchasing, processing or unloading any fish from or caught by

defendants, A Fisherman's Best, Inc. and AFB of Charleston, Inc., are involved in purchasing and selling seafood. The defendant, Ivan Miller, owns the longlining vessel Tri Liner and operated out of Shem Creek in Mt. Pleasant, and intended to operate out of the Charleston Maritime Center.

I. BACKGROUND

The Charleston Maritime Center ("Center") is a waterfront facility owned by the City of Charleston. A plan was developed for the operation of the Center which included leasing it to different entities for use as a fishing and shrimping facility. The Center neighbors a new Aquarium complex. The resolution at issue came about as part of the determinations regarding the leasing of the Center to certain parties. The facilities at the Center include a dock capable of mooring up to thirty fish and

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pelagic longline fishing vessels.

NOW, THEREFORE, BE IT FURTHER RESOLVED that no billfish or swordfish from any source of any kind shall be sold, purchased, processed or unloaded at the Charleston Maritime Center and its appurtenant facilites.

shrimp boats, fuel and ice facilities, refrigeration facilities, and a processing area for unloading (landing), packing, and shipping. The City built the Center because it recognized that dock space in the Charleston area was becoming scarce, no single user could afford the costs of infrastructure, the fish and shrimp industry was beneficial to the local economy, and the infrastructure was necessary for the industry to survive.

Longline fishing gets its name from the fact that the line fished is generally two to forty miles long with shorter lines bearing a hook clipped anywhere from fifty to two hundred yards. Generally, the line fished off the coast of South Carolina ranges between two and ten miles long. This type of fishing appears to be unpopular with conservationist groups and recreational fishermen due to numerous factors, including: the over fishing of pelagic fish (tuna, swordfish, marlin, pelagic sharks); high mortality rates of throw-backs and by-catch; and overcapitalization (too many vessels). For these, and many more reasons, the City has chosen to ban these types of fishermen from using the Center. As a result, shrimpers, recreational fishermen, and other types of commercial fishermen will have exclusive use of the Center. Defendants maintain that currently there are three longline fishing vessels ported in Charleston, all at Shem Creek. Since the filing of this suit the Shem Creek facility has been scheduled to close. According to the defendants, approximately twenty-three fishing vessels

have traditionally landed fish in Charleston during a particular year.

II. SUMMARY JUDGMENT STANDARD

To grant a motion for summary judgment, this court must find that "there is no genuine issue as to any material fact." Fed. R. Civ. P. 56(c). The judge is not to weigh the evidence, but rather to determine if there is a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). If no material factual disputes remain, then summary judgment should be granted against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which the party bears the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). All evidence should be viewed in the light most favorable to the non-moving party. *Perini Corp. v. Perini Constr., Inc.*, 915 F.2d 121, 123-24 (4th Cir. 1990). "[W]here the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, disposition by summary judgment is appropriate." *Teamsters Joint Council No. 83 v. Centra, Inc.*, 947 F.2d 115, 119 (4th Cir. 1991). "[T]he plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex*, 477

U.S. at 322. The "obligation of the nonmoving party is 'particularly strong when the nonmoving party bears the burden of proof.'" *Hughes v. Bedsole*, 48 F.3d 1376, 1381 (4th Cir. 1995) (quoting *Pachaly v. City of Lynchburg*, 897 F.2d 723, 725 (4th Cir. 1990)). Summary judgment is not "a disfavored procedural shortcut," but an important mechanism for weeding out "claims and defenses [that] have no factual basis." *Celotex*, 477 U.S. at 327.

III. COMMERCE CLAUSE

The Commerce Clause provides that Congress "shall have Power . . To regulate Commerce with foreign Nations, and among the several States." U.S. Const. art. I, § 8, cl. 3. "Although the Commerce Clause is by its text an affirmative grant of power to Congress to regulate interstate and foreign commerce, the Clause has long been recognized as a self-executing limitation on the power of the States to enact laws imposing substantial burdens on such commerce." *South-Central Timber Dev. Corp. v. Wunnicke*, 467 U.S. 82, 87 (1984) (plurality opinion). "This 'negative' [or dormant] aspect of the Commerce Clause prohibits economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors . . . . Thus, state statutes that clearly discriminate against interstate commerce are routinely struck down . . . unless the discrimination is demonstrably justified by a valid factor unrelated to

economic protectionism." *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 273-274 (1988). Even when legislating in areas of legitimate local concern, such as environmental protection and resource conservation, states and municipalities are nonetheless limited by the confines of the Commerce Clause. *See Minnesota v. Clover Leaf Creamery*, 449 U.S. 715, 727 (1981) (citations omitted).

In order to determine whether a state or municipal activity violates the negative or dormant commerce clause, the court must make two inquiries: First, is the state "regulating" the market at all, or is the state merely "participating" in it. If the City is deemed a market participant as opposed to a market regulator, then the commerce clause restrictions do not apply at all. *See Wunnicke*, 467 U.S. at 92-95; *White v. Massachusetts Council of Constr. Employees*, 460 U.S. 204, 108 (1983); *Reeves, Inc. v. Stake*, 447 U.S. 429, 436-37 (1980); *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 808-10 (1976). However, if it is determined that the state activity constitutes "regulation" of interstate commerce, then the court must proceed to a second inquiry: (1) whether the state regulation discriminates against interstate commerce, or (2) whether the state regulation incidentally burdens interstate commerce.

Whether or not the regulation falls into category (1) or (2) determines the legal test to which the regulation is subject. A discriminatory law is subject to a stricter

standard. It must serve a legitimate local purpose and there must not be any less discriminatory alternate means to accomplish the same goal. *Hughes v. Oklahoma,* 441 U.S. 322, 336 (1979). If the law only places an incidental burden on interstate commerce then the defendant must show that the burden is clearly excessive in relation to the putative local benefits. *Pike v. Bruce Church, Inc.,* 397 U.S. 137, 142 (1970) (balancing test).

A. Market Participation/Market Regulation

Whether or not a governmental entity is acting as a market participant is a very fact-specific determination. While there does not appear to be a clear definition of what constitutes market participation, market regulation lends itself to more precise description. In *Reeves,* the Court explained that the Commerce Clause responds to "state taxes and regulatory measures impeding free trade in the national marketplace," and that market regulation originally referred to "home embargoes," "custom duties," and "regulations" excluding imports. 447 U.S. at 436 (citing *H.P. Hood & Sons v. DuMond,* 336 U.S. 525, 539 (1949)). Another indicator that a state is acting as a regulator is where some criminal penalty or enforcement mechanism forms part of the regulation. *See SSC Corp. v. Town of Smithtown,* 66 F.3d 502, 512-13 (2nd Cir. 1995). Cases falling within the market participant exception clearly include a State "buying" (*Alexandria Scrap*), "selling" (*Reeves*), and "employing" (*White*). However,

there is no basis to conclude that these activities are the exclusive activities falling within the exception. In *Wunnicke*, the Court further explained that the proper inquiry is whether the state is actually participating in the narrowly defined market as a proprietor rather than simply regulating the actions of other private market participants. 467 U.S. at 94-95; *see e.g., Chance Management v. State of South Dakota*, 97 F.3d 1107, 1113 (8th Cir. 1996) (state-owned lottery system acted as proprietor when imposing residency requirements for licensing of operators).

The first case in which the Supreme Court attempted to define the parameters of the market participant exception was *Hughes v. Alexandria Scrap*, where Maryland had instituted a program designed to remove abandoned automobiles from the State's roadways and junkyards. Basically, to further this purpose Maryland offered a "bounty" (in effect a subsidy) for every Maryland-titled junk car converted into scrap. However, an amendment to the program imposed more detailed documentation requirements on out-of-state than in-state processors, therefore making its less profitable for suppliers to transfer the vehicles outside Maryland. Plaintiff was a Virginia junk processor. In the Court's view, Alexandria Scrap did not involve "the kind of action with which the Commerce Clause is concerned." 426 U.S. at 805. The Court characterized the State's role as: "Maryland has not sought to prohibit the flow of

hulks, or to regulate the conditions under which it may occur. Instead, it has entered into the market itself to bid up their price," *id.* at 806, "as a purchaser, in effect, of a potential article of interstate commerce," and has restricted "its trade to its own citizens or businesses within the State." *Id.* at 808. "Nothing in the purposes animating the Commerce Clause prohibits a State, in the absence of congressional action, from participating in the market and exercising the right to favor its own citizens over others." *Id.* at 810. This example appears to be among the outermost factual situations to fall within the market participant exception.

In *Reeves v. Stake*, a case which falls more clearly into the exception, the State of South Dakota ran a cement plant which for years provided cement to in-state residents and out-of-state buyers. Due to a cement shortage, the State announced a new policy that it would sell first to in-state residents with the remainder going to out-of-state residents or businesses. Finding support in *Alexandria Scrap*, the Court held that South Dakota's actions with regard to whom it would sell cement were within the market participant exception. 447 U.S. at 440. In an attempt to define the parameters of the exception, the Court noted acts of buying and selling as means of participating in the market, and explained that "'[l]ike private individuals and businesses, the Government enjoys the unrestricted power to produce its own supplies, to determine those with whom it will deal, and

to fix the terms and conditions upon which it will make needed purchases.'" *Id.* at 439 n.12 (quoting *Perkins v. Lukens Steel Co.*, 310 U.S. 113, 127 (1940)). It is that right "to determine those with whom it will deal" that most neatly fits the case at bar.

In *South-Central Timber Dev. Corp. v. Wunnicke*, Alaska was not acting as a market participant when it proposed to sell a large quantity of state timber on the condition that the buyer/manufacturer process the timber within the state prior to export. The Court held that "although the State may be a participant in the timber market, it is using its leverage in that market to exert a regulatory effect in the processing market, in which it is not a participant." 467 U.S. at 98. Inasmuch as Alaska retained no proprietary interest in the timber after the time of sale, the State could not be considered a participant in the downstream processing market.

Finally, in *White v. Massachusetts Council of Constr. Employees*, the Court held that the City of Boston was a participant in the labor market, and thus was not "regulating" commerce in violation of the Commerce Clause by requiring all city-funded construction projects to be performed by a work force of at least fifty percent Boston residents. 460 U.S. at 214-15. This requirement forced all city building contractors to hire half of their work force from Boston. As a purchaser of construction services, Boston was participating in the construction

labor market. While Justice Blackmun dissented from the majority's conclusion that Boston acted as a market participant, his explanation of the right to "refuse to deal" reveals a distinction that is helpful in this context:

> [t]he simple unilateral refusals to deal the Court encountered in Reeves and Alexandria Scrap were relatively pure examples of a seller's or purchaser's simply choosing its bargaining partners, 'long recognized' as the right of traders in our free enterprise system. The executive order in this case, in notable contrast, by its terms is a direct attempt to govern private economic relationships. The power to dictate to another those with whom *he* may deal is viewed with suspicion and closely limited in the context of purely private economic relations.

Id. at 1050 (Blackmun, J. dissenting) (footnote omitted) (emphasis in original). This distinction, while not directly applicable to the facts of this case, is helpful to visualize the possible limits of this right to deal or refuse to deal. In this case, the City has simply chosen not to deal with the longliners, thereby leaving the Center for the exclusive use of shrimpers and other fishermen.

The only case that supports the defendants' position that a city's provision of an opportunity to lease space in which to process and land fish for market is *Smith v. Department of Agr. of Ga.* 630 F.2d 1081 (5th Cir. 1980). In *Smith*, the State of Georgia owned and leased its farmers' market to produce farmers. The best located produce booths were assigned first to in-state sellers, then to out-of-state sellers on a first-come-first-serve basis. The court held that this preference was a regulation, and rejected the State's argument that it acted as a participant in the provision of services – the service of providing a space for the sale of produce, and instead held that the State was regulating the produce market. This type of activity – providing a space (either through booth rentals or the lease of the facilities) for use by certain parties – appears identical to the activity challenged here. Nevertheless, the regulation at issue in *Smith* facially discriminated against out-of-state produce vendors favoring in-state produce vendors, and as such is distinguishable. Although the court concluded that the State acted as a market regulator, it did not analyze the State's role in the market, but based its conclusion that providing a space was in fact regulation on citation to *Alexandria Scrap* and *Reeves* for the proposition that this king of activity had been distinguished from their holdings. *Id.* at 1083. The language relied upon in *Alexandria Scrap* and *Reeves* did not address the market participant/regulator role, but instead addressed the weight of the burden on interstate commerce (which is a

different determination altogether). *See Alexandria Scrap*, 426 U.S. at 805-806. In addition, *Smith* was rejected by the Eighth Circuit in *Four T's Inc. v. Little Rock Airport Comm.*, 108 F.3d 909 (8th Cir. 1997). The court in *Four T's* adopted the dissent's position in *Smith* that "'the state had entered into the economic market for the provision of physical marketplaces,' and as such, was acting in its proprietary role as 'a participant in the market for marketplace space. It . . [was] selling a service rather than a good'". *Id.* at 912-13. The Defendants argue that like in *Smith*, the City is not selling or buying fish, but is regulating the area of fish. However, its resolution does not regulate fish, but only the use of the Center.

The City argues that it wholly owns the Center, and is a participant in the real estate market by making decisions with regard to whom it will lease the property. Nowhere does the City prohibit longliners from landing their catch anywhere else in the City or from operating in the waters off of the coast. Prohibiting longliners from using the Center does not in any way regulate the longliners' business or manner in which they conduct their business. As such, this court concurs with the Eighth Circuit in *Four T's* and believes that as a lessor of its property, the City is participating in the economic marketplace for the provision of physical marketplaces. Therefore, the restrictions of the dormant Commerce Clause are inapplicable to the City's actions as a market participant.

B. Discrimination Against Interstate Commerce

Even if the City's resolution is deemed market regulation, the resolution does not discriminate in any way against interstate commerce. Discrimination in this context means "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Pike*, 397 U.S. 137, 142 (1970). The City has not favored any in-state entity over an out-of-state entity. Nothing in the resolution references or restricts any activity or classifies any person based on their residence or state of origin. The defendants argue that the resolution bans the import of pelagic fish into Charleston, and thus it discriminates. The resolution does not, as the defendants argue, ban the importation of pelagic fish in Charleston or anywhere else in the State, but only restricts who can use the Maritime Center and restricts what kinds of fish may be landed there. There are other landing docks, McClellanville, Cherry Point, and Georgetown, at which longliners, including the defendants, may land their fish. This is not the kind of discrimination contemplated by the Commerce Clause.

C. Incidental Burden on Interstate Commerce

If however, the challenging party cannot show the resolution is discriminatory, then it must demonstate that the resolution places an incidental burden on interstate commerce that "is clearly excessive in relation to the

putative benefits." *Clover Leaf Creamery Co.*, 449 U.S. at 471 (quoting *Pike*, 397 U.S. at 142). First, there must be at least an incidental burden on interstate commerce. Incidental burdens are "the burdens on interstate commerce which exceed the burdens on intrastate commerce. . . Thus, the minimum showing required to succeed in a Commerce Clause challenge to a state regulation is that it have a disparate impact on interstate commerce. The mere fact that it may otherwise affect commerce interstate is not sufficient." *Automated Salvage Transport, Inc. v. Wheelabrator*, 155 F.3d 59, 75 (2nd Cir. 1998) (quoting *USA Recycling v. Town of Babylon*, 66 F.3d 1282, 1287 (2nd Cir. 1995); *see also Pacific Northwest Venison Producers v. Smitch*, 20 F.3d 1008, 1015 (9th Cir. 1994) (explaining that "incidental burdens" on interstate commerce include disruption of interstate travel and shipping due to lack of uniformity in state laws, impacts on commerce beyond the borders of the state, or burdens that fall more heavily on out-of-state interests).

In *Pacific Northwest Venison Producers v. Smith* (PNVC), the court held that a statewide ban on the importation, sale, holding, transfer or release of certain deleterious exotic wildlife, including mouflon sheep, fallow deer, sika deer and elk did not incidentally burden interstate commerce. 20 F.3d at 1015. The PNVC was unable to present any evidence to establish the effect on interstate commerce. *Id.* In *Clover Leaf Creamery*, the Court held that the State's ban of nonrecyclable milk

containers did not have even an incidental effect on interstate commerce. While the ban would cause some market disruption, 'There is no reason to suspect that the gainers will be Minnesota firms, and the losers the out-of-state firms." 449 U.S. at 473.

The burden imposed by the City's ban of pelagic fish landing at the Center is relatively minor, if existent at all. While the prohibition of landing these types of fish at the Center may put pressure on the other landing facilities on the South Carolina coast, nothing reveals any effect outside of the State. Defendants argue that the effect of the resolution is essentially to ban the importation of pelagic fish through the port of Charleston because the port "is the only deep water safe harbor within a hundred miles with facilities for unloading pelagic fish." (Def.'s Ex. 3). (There are small unloading facilities in Georgetown, McClellanville, and Cherry Point (near Rockville)). They assert that due to their difficulty landing their catch, the price will rise and put them at a disadvantage versus their out-of-state competitors. This turns their argument into discrimination against in-state commerce, not discrimination against out-of-state commerce. This is not the type of "protectionism" the Commerce Clause was intended to remedy. If the ban of all import, sale, or possession of certain game in the entire state of Washington does not have an incidental effect on interstate commerce, then the failure to give longliners a

landing pier for their fish in the Charleston Harbor can hardly be seen to have an incidental effect on interstate commerce.

Even reaching the *Pike v. Bruce Church* balancing test to determine the constitutionality of an incidental burden on interstate commerce, the resolution does not impose a clearly excessive burden on commerce in relation to the putative local benefits. "Putative" as a descriptor of local benefits is very important in this analysis because of the necessity that the court refrain from judging the merits of the legislative justifications. The principle that a challenger cannot prevail so long as "it is evident that from all the considerations presented to [the legislature], and those which we may take by judicial notice, that the question is at least debatable" has become to be incorporated into the Commerce Clause analysis. *See Clover Leaf Creamery*, 449 U.S. at 724, 729 (referencing incorporation of principles from Equal Protection jurisprudence); *CTS Corp v. Dynamics Corp. of America*, 481 U.S. 69, 92 (1987). Coupled with this principle is the rule that a legislature need not stike at all evils at the same time and in the same way. *Clover Leaf Creamery*, 449 U.S. at 725.

Defendants rely upon *Louisiana Seafood Mgt. Council v. Foster*, 917 F.Supp. 439 (D. La. 1996), in which a fish-related regulation was struck down as a violation of the dormant commerce clause (the court issued a

preliminary injunction on the basis the challengers would prevail on the merits). The challenged regulation prohibited commercial fishing for certain fish on the weekends. The court labeled the incidental effects as the "deprivation of finfish that would have been harvested but for the restriction against weekend fishing,"and held that there was an incidental burden on interstate commerce because "commerce is being deprived of the finfish, and byproducts, which would be captured and tansported in interstate commerce." *Id.* at 445. The court considered and rejected the two purported justifications: conservation and the prevention of a clash between commercial and recreational fishermen. Conservation could not be served by only excluding commercial fishermen, leaving the weekends open to recreational fishermen. And, the court found that the State had failed to present any evidence of an actual conflict between the two classes of fishermen. In failing to consider the term "putative" and its implications in this context, the court placed too much emphasis on the City's presentation of proof.

The City has offered numerous benefits and reasons for passage of the resolution at issue. The following is an abbreviated version of the list of those reasons taken from the City's memorandum in support of summary judgment:

1. Establishing and preserving an eco-tourist friendly environment of the Aquarium-Maritime Center.

2. Preserving a City image dedicated to conservation of the environment, both historical and natural.

3. Encouraging economic growth of shrimping activities and recreational fishing.

4. Minimizing the possibility of confrontations between recreational anglers and longliners.

5. Discouraging increased fishing pressure on pelagic fish.

6. Avoiding City funds from being used to capitalize longliner operations when those operations are either detrimental to certain fishes or are perceived by the public as being not environmentally sound and where evidence suggest that the industry is already over capitalized.

7. Attracting sports fishermen to Charleston who sympathize with cause.

8. Promoting ecology.

9. Promoting historical fisheries which are consistent with Charleston's image.

10. Attempting to increase the local price of swordfish to discourage consumption of same in local restaurants.

11. Supporting Save our Swordfish campaign.

12. Supporting position of local taxpayers.

13. Making space for shrimping vessels for which facility was principally designed.

Clearly, at least a majority of the above justifications are arguable. While it may be contested as to whether banning longliners from the Center will have any direct effect on the population of the pelagic fish off the coastline, it is debatable that disallowing them from the Center may well prevent an increase in the number of longliners already fishing off the coast. In response to the City's argument that the longliners' landings at the

Center could have a negative impact on the public/eco-tourist perception of the adjacent Aquarium, the Defendants contend that the longliners will already be at the Center—for ice, fuel, and in the case of an emergency—and thus the prohibition is arbitrary. One can well perceive a difference between a longliner stocking up on ice and fuel and that of longliners using the facility to unload and process their catch. The burden placed on longliners by the resolution is not clearly excessive to the putative local benefits.

IV. PREEMPTION

The defendants also contend that the City's resolution is preempted by the Magnuson Fishery Conservation and Management Act of 1976, codified at 16 U.S.C. § 1801-1883, which regulates the fishing industry. The Act established the Exclusive Economic Zone ("EEZ") in the waters off the U.S. coastline running from the outer limits of state territorial waters to 200 miles seaward. *Id.* § 1811. All fish except highly migratory species are subject to the exclusive fishery management authority of the United States. In addition, the Act established eight regional fishery management councils and provides that management within each region shall be conducted pursuant to fishery management plans prepared by each council for each species of stock fish within the region. *Id.* § 1852. States continue to regulate fishing out to the seaward limit of

state territorial waters. The following relevant portions of the state law savings clause in the Act have fueled and confused the preemption debate:

> (1) Except as provided in subsection (b) of this section, nothing in this chapter shall be construed as extending or diminishing the jurisdiction or authority of any State within its boundaries.
>
> . . .
>
> (3) A State may regulate a fishing vessel outside the boundaries of the State in the following circumstances:
>
> (A) The fishing vessel is registered under the law of that State, and (i) there is no fishery management plan or other applicable Federal fishing regulations for the fishery in which the vessel is operating; or (ii) the State's laws and regulations are consistent with the fishery management plan and applicable Federal fishing regulations for the fishery in which the vessel is operating.
>
> (b) Exception

(1) If the Secretary finds, after notice and an opportunity for a hearing in accordance with section 554 of Title 5, that--

(A) the fishing in a fishery, which is covered by a fishery management plan implemented under this chapter, is engaged in predominately within the exclusive economic zone and beyond such zone; and

(B) any State has taken any action, or omitted to take any action, the results of which will *substantially and adversely affect the carrying out of such fishery management plan;* the Secretary shall promptly notify such State and the appropriate Council of such finding and of his intention to regulate the applicable fishery within the boundaries of such State (other than its internal waters), pursuant to such fishery management plan and the regulations promulgated to implement such plan.

16 U.S.C.A. § 1856 (West 1985 & Supp. 1999).

Few courts have been faced with the question of preemption by the Magnuson Act. The Eleventh Circuit considered the preemption issue in *Southeastern Fisheries*

Assoc. Inc. v. Chiles, 979 F.2d 1504 (11th Cir. 1992), where it held that the Act probably preempted Florida regulations that limited the number of pounds of Spanish Mackerel that a commercial vessel can bring into the State port on any given date. By characterizing the scope of the Act as the regulation of "fishery management activities in the EEZ," the court focuses the relevance of the Act in the case at bar. The Chiles court also concluded that, due to the legislative history of the Act and the preceding federal regulation, the meaning of subsection (1) of the above savings clause was intended only to preserve the State's autonomy over its territorial waters (up to 3 miles out), and was not to include any part of the EEZ. *Id.* at 1508 n.4. In *State of Rhode Island v. Sterling*, 448 A.2d 785 (R.I. 1982), the court there held that the Act preempted the state's imposition of flounder possession and landing limits where the Act did not impose any limits. These cases all deal with limits for fish of a certain type in the state.

The focus on fisheries in the EEZ has also led other courts to conclude that not all regulation touching the fishing industry is preempted by the Act. *See*, e.g., *Louisiana Seafood Mgt. Council v. Foster*, 917 F. Supp. 439, 444 (D. La. 1996) (no preemption where regulation regulated fishing activity and possession of finfish only in state territorial waters); *Raffield v. State*, 565 So.2d 704 (Fla. 1990) (no preemption where state statute only prohibited possession of finfish captured with gill net

within the state's territorial waters and land); *People v. Weeren*, 607 P.2d 1279 (Cal. 1980) (upholding statute which prohibited the taking of swordfish with the assistance of a spotter aircraft in the EEZ where state facilities were to be used for the landing and processing and prohibition furthered federal interest of conservation).

The City argues that the resolution only bans longliners from landing their catch at one location—the City Maritime Center, and has no effect on the EEZ or where the longliners choose to land their fish elsewhere, and as such is not preempted because it does not significantly and adversely affect the fisheries off of South Carolina. By framing the issue narrowly, defendants maintain that there is no conflict between the resolution and federal law or regulation, as no federal regulation requires that private citizens or government entities assist in the unloading of pelagic species or other fish. The City concedes that it has no right to limit the number of fish caught or landed in South Carolina, and has not attempted to do so.

In contrast, the defendants contend that the resolution "effectively places a zero limit on the number of fish that may be caught by longliners off the coast of South Carolina." In support of that conclusion, defendants rely on the alleged intent of the resolution to prevent longline fishing vessels from operating off the

coast of South Carolina in the EEZ. However, the jump in logic from the prohibition of longliners at the City Maritime Center to the total ban on longliners in the entire State of South Carolina is untenable. The longliners are not prohibited from landing their catch anywhere else except the Maritime Center. Despite assertions to the contrary, longliners continue to fish off the coast of South Carolina and continue to land their catch in South Carolina. They just use other landing spots.

While it is undisputed that there is a federal management plan in effect in the EEZ off the S.C. coast, the City resolution does not regulate fisheries within the EEZ. It does not place any limits by number or poundage on a catch; it does not by its nature even reach the EEZ in any way except that those longliners fishing there cannot rely on the Maritime Center as a place to land their fish. Therefore, the defendants fail to raise any material issues of fact with regard to preemption.

V. EQUAL PROTECTION

Where the classification propounded by the statute does not implicate a suspect classification or a fundamental right, the test to be applied is that of mere rationality. *City of Cleburne v. Cleburne Living Ctr. Inc.*, 473 U.S. 432 (1985); *New York City Transit Authority v. Beazer*, 440 U.S. 568 (1979); *New Orleans v. Dukes*, 427 U.S.

297 (1976); *Williamson v. Lee Optical of Oklahoma*, 348 U.S. 483 (1955). The degree of deference afforded under this standard of review is great. "[T]he judiciary may not sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines; in the local economic sphere, it is only the invidious discrimination, the wholly arbitrary act, which cannot stand consistently with the Fourteenth Amendment." *Dukes*, 427 U.S. at 303-04 (citations omitted). The statutory classification "need not be drawn so as to fit with precision the legitimate purposes animating it." *Alexandria Scrap*, 426 U.S. at 813. Moreover, the challenger must attack every conceivable basis for the regulation. *See FCC v. Beach Communications, Inc.*, 508 U.S. 307), 315 (1993). The attacking party has the burden of proving the classification is so attenuated to its asserted purpose that the distinction it draws is wholly arbitrary and irrational. *City of Cleburne*, 473 U.S. at 446. As was similar with regard to the Commerce Clause analysis, and will be similar to the Due Process analysis, with this deference comes two important considerations: (1) that any conceivable local purpose if reasonably related will suffice, in other words, the actual purpose need not support the regulation, and (2) legislative action may be "one step at a time," meaning it may be underinclusive.

The defendants concede that the rational basis test applies, but argue that the City has failed to produce any evidence supporting the legitimate interests. They claim that the resolution does not affect the conservation of resources, and in fact, by promoting recreational fishermen, increases pressure on the resource. Defendants contend that there is no proof that longlining operations will affect the Aquarium, no proof that there is any confrontation between recreational fishermen and longliners, no proof that shrimp boats will be displaced, no proof that there is an ecological, environmental, or conservation benefit from the resolution. The defendants err in putting the City to proof of the reasonableness of the resolution. The burden of proof is on the defendants. The City did not have to actually rely on any of the putative ends.

In addition, the defendants rely on *Louisiana Seafood Mgt. Council v. Foster*, 917 F. Supp. 439 (E.D. La. 1996) (issuing a preliminary injunction). The only issue in *Louisiana Seafood* analyzed on equal protection grounds concerned the classification that rod & reel commercial fisherman must have acquired a gill net license in two of the past three years to be eligible for a commercial rod & reel license that year. *Id.* at 446. In the past the R&R fisherman had no need to purchase a gill net license because they were not gill net fishermen and had no need for the license. The court held that this classification in

the statute was either a mistake or a completely arbitrary classification and struck it down.

Foster is not analogous to the case at bar. The City has submitted numerous reasons for excluding the longliners, all of which are listed *infra*. While the defendants attack the City's proof of reasonableness, the link between the putative reasons and the resolution is not arbitrary or irrational. At the very least, the resolution would prevent an increase in longliners fishing off the South Carolina coast. While it may be debatable whether or not the longliners contribute to the majority of the depletion of the pelagic fish, there appears to be a greater mortality rate among their throw-backs than that which occurs from recreational fisherman and shrimpers. While the recreational fishermen may also contribute to the depletion of the fish, and while the resolution may result in an increased presence of recreational fishermen which would in turn increase pressure on the fish, legislation may act one step at a time. Underinclusiveness is not necessarily an indicator of arbitrariness.

VI. DUE PROCESS

Defendants also argue that the resolution violates the Due Process Clause of the Fourteenth Amendment. It has long been recognized that when reviewing economic and social legislation, the court's only role is to

assure that there is some rational relationship between the means and ends of the state regulation. *See, e.g., Lee Optical*, 348 U.S. at 488 (regulation of visual care). In *Nebbia v. People of the State of New York*, 291 U.S. 502 (1934), the Supreme Court ushered in the mandate for substantial judicial deference when considering constitutional challenges to economic and social regulation. When, as here, there is no implication of a fundamental right, due process only protects against the unreasonable, arbitrary or capricious law or regulation. As summarized by the Court so long ago in *Nebbia*:

> [t]he Fourteenth [Amendment does] not prohibit governmental regulation for the public welfare. [It] merely condition[s] the exertion of the admitted power, by securing that the end shall be accomplished by methods consistent with due process. And the guaranty of due process, as has often been held, demands only that the law shall not be unreasonable, arbitrary, or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained.

Id. at 525.

Defendants rely upon a South Carolina case which stuck down, on Due Process grounds (both federal and

state), a local ordinance that prohibited the operation of B-B-Q stands (the definition of which actually included all restaurants, lunch rooms, or sandwich shops) after 11 p.m. within the vicinity of a residential area (where residential area was defined as two or more homes) in an attempt to argue there is a higher standard for those laws "regulating lawful business enterprise" than for those "enacted to protect the public health." *Fincher v. City of Union*, 196 S.E. 1 (S.C. 1938). However, there is no such standard in federal jurisprudence, and application of that case is unwarranted. The City in this case has not passed an ordinance regulating Defendants' business operations. It has regulated its own property.

Just as analyzed under the Equal Protection clause, the prohibition of longliners from the Center bears a rational relationship to the putative local benefits submitted by the City. It is not necessary for government to remedy all evils consistently or at the same time.

VII. STATE LAW GROUND – POLICE POWER/HOME RULE ACT

The final ground on which the Defendants seek to challenge the City's motion for summary judgment falls

under state law.[2] The defendants contend that the resolution is procedurally defective, and in violation of the police powers under which local government practices. To first dispose of the police power argument, the court incorporates the constitutional analyses to conclude that as a reasonable local governmental decision, the resolution at issue is not in violation of the inherent police power of the City.

With respect to the procedural issue, the Home Rule Act, S.C. Code Ann. §§ 5-7-10 to -3 10 (Law. Co-op. Supp. 1998), sets forth the powers of and procedures for local government. The grant of power to cities is to be construed liberally, *see id.* § 5-7-10, and has also received broad judicial interpretation *see Hospitality Ass'n of S.C., Inc. v. County of Charleston*, 464 S.E.2d 113 (S.C. 1995). First, the defendants contend that the procedural method in which the resolution at issue was passed by City Council was flawed. By arguing that the resolution should have been subject to two readings, as opposed to the one reading it received, the defendants imply that the action taken by the City to prohibit the longliners from the Center required the passage of an ordinance. Section 5-7-270 of the Act requires that all ordinances have two

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[2]The defendants couched this claim in terms of procedural due process and state law, but the court will address it as a state law issue.

readings. While City Council must pass an ordinance to actually "sell or lease or contact to sell or lease" its own land, *id.* § 5-7-260 (6), there is no such requirement to prohibit certain persons from using City property. Therefore a resolution will suffice.

As further support for the City's authority under state law to determine with whom it will do business, section 5-7-40 gives cities the power to own, sell, lease or otherwise dispose of property. In addition to statutory power to exercise dominion over municipal property, cities, like any other proprietor, are afforded considerable discretion in the exercise of this power. *See Barnhill v. City of North Myrtle Beach*, 511 S.E.2d 861 (S.C. 1999) (restricting the use of its beaches for the launching of motorized watercraft); *Captain Sandy's Tours v. Georgetown Cty.*, 323 S.E.2d 99 (S.C. 1992) (restricting the use of its boat landing for commercial purposes). Defendants have failed to raise any material issues of fact which would sustain this action on the basis of state law grounds.

VIII. CONCLUSION

It is, therefore,

ORDERED, for the foregoing reasons that Plaintiff's motion for summary judgment is GRANTED, and it is, therefore, ORDERED that the resolution passed

by the City of Charleston on July 21, 1998, is not violative of the U.S. Constitution or the laws of the State of South Carolina as presented to this Court,

AND IT IS SO ORDERED.

PATRICK MICHAEL DUFFY
UNITED STATES DISTRICT JUDGE

Charleston, South Carolina
June 22, 1999

ORIGINAL
FILED

UNITED STATES DISTRICT COURT
DISTRICT SOUTH CAROLINA
CHARLESTON DIVISION

CITY OF CHARLESTON,	)	CA#: 2:99-0828-23
	)	
Plaintiff,	)	
	)	
v.	)	JUDGMENT
	)	
A FISHERMAN'S BEST	)	*ENTERED*
INC, AFB OF	)	*6/23/99*
CHARLESTON INC,	)	
IVAN MILLER and the	)	
FISHING VESSEL TRI	)	
LINER,	)	
	)	
Defendants.	)	

This action came before the Court, the Honorable P. Michael Duffy, United States District Judge, presiding on the Plaintiff's motion for summary judgment. The issues have been heard and a decision duly rendered.

IT IS ORDERED that the Plaintiffs' motion for summary judgment is GRANTED.

IT IS FURTHER ORDERED that the resolution passed by the City of Charleston on July 21, 1998 is not violative of the U.S. Constitution or the laws of State of South Carolina as presented to this Court.

LARRY W. PROPES, Clerk of Court

BY: _____
Shireen J. Nelson, Deputy Clerk

June 23, 1999
Charleston, South Carolina

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

FILED
November 26, 2003

No. 99 - 1991
CA - 99 - 828 - 2 - 23

CITY OF CHARLESTON, SOUTH CAROLINA,
a municipal corporation

Plaintiff - Appellee

v.

A FISHERMAN'S BEST, INCORPORATED; AFB OF CHARLESTON, INCORPORATED; IVAN MILLER; and the fishing vessel TRI LINER

Defendants - Appellants

On Petition for Rehearing En Banc

The appellee's petition for rehearing en banc was to this Court. As no member of this Court requested a poll on the petition for rehearing en banc,

IT IS ORDERED that the petition for rehearing en banc is denied.

For the Court,

/s/ Patricia S. Connor

CLERK

99 - 1991

Timothy Alan Domin, Esq.
CLAWSON & STAUBES
304 Meeting Street
Charleston, SC 29401

[SEAL]

A RESOLUTION TO AUTHORIZE THE MAYOR OF THE CITY OF CHARLESTON TO ENTER INTO MONTH TO MONTH LEASES FOR THE USE OF THE CHARLESTON MARITIME CENTER AND ITS APPURTENANT FACILITIES; TO PROHIBIT THE USE OF THE SAID CENTER AND ITS FACILITIES BY FISHING VESSELS THAT UTILIZE PELAGIC LONGLINE TACKLE; AND TO PROHIBIT THE SALE, PURCHASE, PROCESSING OR UNLOADING OF ANY FISH FROM OR CAUGHT BY PELAGIC LONGLINE FISHING VESSELS INCLUDING BUT NOT LIMITED TO BILLFISH AND SWORDFISH.

WHEREAS, the City Council of the City of Charleston makes the following findings of fact:

1. The waters of the City of Charleston are as much a part of its history and tradition as is its grand architecture. The geographic and economic growth of the City is, and has been, inextricably linked to its waterfront environment; and

2. Over the course of the last thirty (30) years, the City has made concerted efforts to protect its waterfront areas from environmentally insensitive uses, and has been steadfast in assuring and preserving for the

public, access to, and use and enjoyment of, its waterfront. These efforts have included the acquisition of a 5 acre park on the western bank of the Ashley River, the acquisition of a 51 acre nature preserve along the shores of Church Creek; the acquisition and development of Brittlebank Park on the eastern bank of the Ashley River; the maintenance and improvement of White Point Gardens; the development of the 13 acre passive Waterfront Park along the western bank of the Cooper River; the acquisition of a 5 acre waterfront site on the Cooper River; and the construction of the South Carolina Aquarium, also on the Cooper River. The City has also been very successful in its effort to acquire land or necessary easements toward the goal of providing an uninterrupted pedestrian path along the water's edge from Brittlebank Park, to the Battery, to the Waterfront Park, to the South Carolina Aquarium; and

3. These efforts on the part of the City have been pursued to assure to the public perpetual access to the natural environment, and all efforts of the City in the development of these accesses has been undertaken in a manner sensitive to the environment, and in recognition of the importance of these areas to the heritage of the City and its citizens; and

4. As part of its continuing efforts to revitalize, preserve and make available to the public the water's edge, the City has constructed a Maritime Center

on a portion of a 5 acre site on the Cooper River, immediately south of the Dockside Condominiums and the South Carolina Aquarium. The City's purpose in constructing the Maritime Center has been to provide a place for uses, both recreational and commercial, that are consistent with those traditionally and historically conducted on the City's waterfront. To this end, the Maritime Center will include a pier devoted to recreational events and a pier, with supporting facilities, devoted to foster the shrimping and fishing industry that has, historically, been a part of the City's waterfront environs; and

5. City Council has determined to solicit proposals for the operation of the portion of the Maritime Center that to serve this industry, and in doing so, finds it to be in the public interest, and in furtherance of its efforts to promote its waterfront, to require that this portion of the Maritime Center be operated and used in a manner traditional to such industry and to the City and consistent and compatible with the tenor of other City supported public uses along the waterfront, particularly the Aquarium to the north, and proposed Union Pier and the passive waterfront park to the south; and

6. The City encourages and promotes creativity in the use and operation of the commercial portion of the Maritime Center, but finds that such proposals must, to advance the City's goal, include

elements that foster and enhance the public appeal, enhance the public understanding and appreciation of its delicate maritime resources, enhance the preservation of fisheries resources, discourage fish practices that result in wasteful loss of such resources, and include elements compatible and consistent with the educational and environmental mission of the South Carolina Aquarium and the waterfront park; and

7. City Council further finds that there has been much public debate over the past few months over the depletion of the ocean's fisheries, especially off the coast of South Carolina, and the effect the operation of the Maritime Center will have on these resources. City Council has followed the debate and is concerned that the operation of the Center furthers the goal of preservation of fisheries to the extent practicable, while also protecting the traditional shrimping and fishing industry in their traditional manner of gathering these resources. City Council further finds that pelagic longline fishing practices result in the loss of the great majority of fish caught, both to the consuming public and more importantly, to the fish population, and that such practices are the primary source of swordfish capture, and

8. City Council further finds that all billfish, including swordfish, are the most threatened of species caught off the coast of South Carolina and that it would

be incompatible with the goals of the City in establishing the Maritime Center to allow the processing or sale of such species; therefore, no billfish nor swordfish shall be processed or sold at the Maritime Center.

NOW, THEREFORE., BE IT RESOLVED that the Mayor of the City of Charleston is hereby authorized to enter into month to month leases for the use of the Charleston Maritime Center and its appurtenant facilities.

NOW, THEREFORE, BE IT FURTHER RESOLVED that the use of the Charleston Maritime Center and its appurtenant facilities is hereby prohibited to fishing vessels utilizing pelagic longline tackle, which shall be prohibited from docking or tying up at the Charleston Maritime Center and its appurtenant facilities for any purpose other than to purchase fuel or ice or in the case of a storm or other emergency.

NOW, THEREFORE, BE IT FURTHER RESOLVED that any Lessee or user of any part of the Charleston Maritime Center and its appurtenant facilities shall be prohibited from selling, purchasing, processing or unloading any fish from or caught by pelagic longline fishing vessels.

NOW, THEREFORE, BE IT FURTHER RESOLVED that no billfish or swordfish from any source of any kind

shall be sold, purchased, processed or unloaded at the Charleston Maritime Center and its appurtenant facilities.

NOW, THEREFORE, BE IT FURTHER RESOLVED that a copy of this Resolution shall be entered into the official Journal of City Council.

IN WITNESS WHEREOF, THE CITY COUNCIL OF CHARLESON has caused these presents to be executed in its name by Joseph P. Riley, Jr., its Mayor and by Vanessa Turner-Maybank, its Clerk of Council, and its corporate seal to be hereto affixed this 21st day of July, 1998.

CITY COUNCIL OF CHARLESTON:
(SEAL)

/s/
Joseph P Riley, Jr.
Mayor

ATTEST:

/s/
Vanessa Turner-Maybank
Clerk of Council

[16 U.S.C. § 1856]

(a) In general

(1) Except as provided in subsection (b) of this section, nothing in this chapter shall be construed as extending or diminishing the jurisdiction or authority of any State within its boundaries.

(2) For the purposes of this chapter, except as provided in subsection (b) of this section, the jurisdiction and authority of a State shall extend—

> (A) to any pocket of waters that is adjacent to the State and totally enclosed by lines delimiting the territorial sea of the United States pursuant to the Geneva Convention on the Territorial Sea and Contiguous Zone or any successor convention to which the United States is a party. . . .
>
> . . . .

(3) A State may regulate a fishing vessel outside the boundaries of the State in the

following circumstances:

(A) The fishing vessel is registered under the law of that State, and (i) there is no fishery management plan or other applicable Federal fishing regulations for the fishery in which the vessel is operating; or (ii) the State's laws and regulations are consistent with the fishery management plan and applicable Federal fishing regulations for the fishery in which the vessel is operating.

(B) The fishery management plan for the fishery in which the fishing vessel is operating delegates management of the fishery to a State and the State's laws and regulations are consistent with such fishery management plan. If at any time the Secretary determines that a State law or regulation applicable to a fishing vessel under this circumstance is not consistent with the fishery management plan, the Secretary shall promptly notify the State and the appropriate Council of such determination and provide an

opportunity for the State to correct any inconsistencies identified in the notification. If, after notice and opportunity for corrective action, the State does not correct the inconsistencies identified by the Secretary, the authority granted to the State under this subparagraph shall not apply until the Secretary and the appropriate Council find that the State has corrected the inconsistencies. For a fishery for which there was a fishery management plan in place on August 1, 1996 that did not delegate management of the fishery to a State as of that date, the authority provided by this subparagraph applies only if the Council approves the delegation of management of the fishery to the State by a three-quarters majority vote of the voting members of the Council.

(C) The fishing vessel is not registered under the law of the State of Alaska and is operating in a fishery in the exclusive economic zone off Alaska for which there was

no fishery management plan in place on August 1, 1996, and the Secretary and the North Pacific Council find that there is a legitimate interest of the State of Alaska in the conservation and management of such fishery. The authority provided under this subparagraph shall terminate when a fishery management plan under this chapter is approved and implemented for such fishery.

(b) Exception

(1) If the Secretary finds, after notice and an opportunity for a hearing in accordance with section 554 of Title 5, that—

(A) the fishing in a fishery, which is covered by a fishery management plan implemented under this chapter, is engaged in predominately within the exclusive economic zone and beyond such zone; and

(B) any State has taken any action, or omitted to take any action, the

results of which will substantially and adversely affect the carrying out of such fishery management plan;

the Secretary shall promptly notify such State and the appropriate Council of such finding and of his intention to regulate the applicable fishery within the boundaries of such State (other than its internal waters), pursuant to such fishery management plan and the regulations promulgated to implement such plan.

(2) If the Secretary, pursuant to this subsection, assumes responsibility for the regulation of any fishery, the State involved may at any time thereafter apply to the Secretary for reinstatement of its authority over such fishery. If the Secretary finds that the reasons for which he assumed such regulation no longer prevail, he shall promptly terminate such regulation.

(3) If the State involved requests that a hearing be held pursuant to paragraph (1), the Secretary shall conduct such hearing prior to taking any action under paragraph (1). . . .

Supreme Court, U.S.
FILED
MAY 12 2003
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No. 02-1271

In the

Supreme Court of the United States

CITY OF CHARLESTON, SOUTH CAROLINA,

Petitioner,

v.

A FISHERMAN'S BEST, INC., AFB OF CHARLESTON, INC., IVAN MILLER, and THE FISHING VESSEL TRI LINER,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

Stanley M. Brand
Counsel of Record
David E. Frulla
Andrew D. Herman
Brand & Frulla, P.C.
923 15th Street, N.W.
Washington, DC 20005
(202) 662-9700
Attorneys for Respondents A Fishermen's Best, Inc., AFB of Charleston, Inc., Ivan Miller, and the Fishing Vessel Tri Liner

CURRY & TAYLOR • (202) 393-4141 • HTTP://USSCINFO.COM

QUESTIONS PRESENTED FOR REVIEW

Respondents submit that the following questions more accurately reflect the fundamental legal claims that Petitioner has presented:

1) Whether the "proprietary capacity exception" to the doctrine of preemption applies to the city resolution prohibiting the landing of fish caught with certain types of legal fishing gear from utilizing a city maritime center built with a federal grant available only to a governmental entity.

2) Whether federal fishery regulations preempt a municipal legislative enactment effectively banning the landing of fish caught with certain types of legal fishing gear.

LIST OF PARTIES

Appellee Below:

The City of Charleston, South Carolina, a municipal corporation

Appellants Below:

A Fisherman's Best, Inc., a corporation organized and existing under the laws of the State of Florida

AFB of Charleston, Inc., a corporation organized and existing under the laws of the State of South Carolina

Ivan Miller

The Fishing Vessel Tri Liner

CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Respondent A Fisherman's Best, Inc. has no parent companies or non-wholly owned subsidiaries. Respondent AFB of Charleston, Inc. has no parent companies or non-wholly owned subsidiaries.

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW i

LIST OF PARTIES ii

CORPORATE DISCLOSURE STATEMENT ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 3

CONCLUSION 12

TABLE OF AUTHORITIES

CASES

ALAMEDA NEWSPAPERS, INC. v. OAKLAND, 95 F.3D 1406, 1416 (9TH CIR. 1996) 9, 10, 11

BUILDING & CONSTRUCTION TRADES COUNCIL v. ASSOCIATED BUILDERS AND CONTRACTORS, 507 U.S. 218 (1993) ..... *passim*

CARDINAL TOWING & AUTO REPAIR, INC. v. BEDFORD, TEXAS, 180 F.3D 686, 695 (5TH CIR. 1999) 8

CITY OF COLUMBUS v. OURS GARAGE & WRECKER SERVICE, INC., 536 U.S. 424 (2002) 9

HUGHES v. ALEXANDRIA SCRAP CORP., 426 U.S. 794 (1976) 7

REEVES, INC. v. STAKE, 447 U.S. 429 (1980) 7

SIXTH CIRCUIT-IN PETREY v. TOLEDO, 246 F.3D 548, 557 (6TH CIR. 2001) 9

SOUTHEASTERN FISHERIES ASSOC., INC. v. CHILES, 979 F.2D 1504 (11TH CIR. 1992) 11

SPRINT SPECTRUM L.P. v. MILLS, 283 F.3D 404, 420 (2D CIR. 2002) 8

STATUTES, RULES AND REGULATIONS

16 U.S.C. §§ 1801-1883 4

18 U.S.C. § 874 2

40 U.S.C. § 276(A)(5) 2

40 U.S.C. § 276(c) 2

40 U.S.C. §§ 327-332 2

42 U.S.C. § 3241 (REPEALED 1998) 1, 2

42 U.S.C. § 3243 (REPEALED 1998) 1

SUPREME COURT RULE 10 11

SUPREME COURT RULE 10(A) 3

STATEMENT OF THE CASE

Respondents incorporate by reference the statement of the facts set forth by the United States Court of Appeals for the Fourth Circuit. (A-2 to 28).

Respondents must emphasize that Petitioner's Statement of the Case provides only a highly selective history of the Charleston Maritime Center. Petitioner ignores the distinctly governmental process that enabled the City of Charleston to construct the Maritime Center. This process is set forth in detail in the Panel's opinion. (A-6 to 27). The Panel emphasized that the City constructed the Charleston Maritime Center with millions of dollars in federal funds from the Economic Development Administration of the United States Department of Commerce. (A-10). The EDA provided the "Special Economic Development and Adjustment Assistance" grant to the City pursuant to Title IX, § 903 of the Amended Public Works and Economic Development Act of 1965, 42 U.S.C. § 3243 (repealed 1998). The grant program that funded the Maritime Center is available only to government entities. These grants are limited to "State and local areas" to "encourage intergovernmental action" to "solve economic adjustment problems." 42 U.S.C. § 3241 (repealed 1998). The City now asks to be treated as a private entity, yet was able to utilize federal largesse to build the Maritime Center solely by dint of its governmental status.

The City, moreover, agreed to Federal regulation and requirements to obtain the grant. The EDA was required under the EDA Grant's Special Terms and Conditions to provide "prior written approval" for "[a]ny leasing or renting of the facilities involved in the project . . . . ." EDA Grant Special Terms and Conditions at 6

(filed under separate cover with Appellants' Reply Brief to the Fourth Circuit).[1] In fact, by applying for and accepting the EDA grant, the City agreed to abide by numerous federal statutes, as set forth in the language of the grant. *Id.* at 3-5; EDA Grant General Terms and Conditions for Construction Components at 1-10 (filed under separate cover with Appellants' Reply Brief to the Fourth Circuit). Included in these requirements are numerous federal labor laws, including the Davis-Bacon Act, 40 U.S.C. § 276(a)(5); the Contract Work Hours Standard Act, 40 U.S.C. §§ 327-332; and the Copeland "Anti-Kickback" Act, 40 U.S.C. § 276(c), 18 U.S.C. § 874. It is more than passingly ironical, then, that the City would now rely so heavily on *Building & Construction Trades Council v. Associated Builders and Contractors*, 507 U.S. 218 (1993), where the issue specifically involved **exemption** from Federal labor standards.

The Appeals Panel also detailed the highly-politicized process whereby the City twice assigned management of the Maritime Center to its operator, the Parks and Recreation Commission ("PRC"), only to then withdraw that authority via its "legislative"[2] disapproval of the PRC's sub-leasing award to Respondents based on over-arching policy reasons involving the conduct of pelagic longline fishing in the U.S. Exclusive Economic Zone. (A-11 to 27).

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[1] Respondents will provide the Court with copies of the materials cited herein (or any other part of the records below) should the Court so request.

[2] Even Judge Luttig's dissent acknowledges the "legislative" aspect of what actually amounted to the City's serial countermanding of the Maritime Center's business operator, the PRC. (A-67).

REASONS FOR DENYING THE WRIT

Despite Petitioner's attempts to style this case as one presenting a constitutional conflict regarding the preemption doctrine, the petition for *certiorari* focuses on the Fourth Circuit's application of the case law of this Court and the circuit courts to the specific facts of this matter. Stripped of its rhetoric, the petition essentially objects to the Fourth Circuit's factual decision that the City ordinance was a regulation that interfered with federal fisheries law. However, salient to the issue of *certiorari*, the Panel correctly articulated and then applied the legal standards elucidated by this Court and other circuit courts to the facts of this case.

In this case, the Appeals Court found that: 1) the City's resolution frustrated the purpose of Federal fishing regulations and was, thus, preempted, and 2) the "proprietary capacity exception" to the preemption doctrine did not save this extensive municipal regulation. That other courts have reached contrary conclusions as to the application of the proprietary capacity exception when applying the same legal standards to different factual circumstances does not create a conflict meriting *certiorari*. Petitioner fails to demonstrate a conflict with federal case law regarding the law of preemption or the proprietary capacity exception. Petitioner's effort to cloak its factual claims in the language of legal conflict must thus fail, as the Petitioner has not satisfied the standard for *certiorari* set forth by Supreme Court Rule 10(a).

Respondents thus respectfully urge this Honorable Court to deny the Petition for Writ of *Certiorari*.

I. THE FOURTH CIRCUIT'S DECISION REGARDING THE "PROPRIETARY CAPACITY EXCEPTION" DOES NOT CONFLICT WITH EXISTING PRECEDENT

Petitioner initially and incorrectly asserts that the Fourth Circuit's ruling is directly at odds with both Supreme Court and Federal Appellate Court precedent applying the proprietary capacity exception to the preemption doctrine. Pet. at 11. This contention is meritless.

A. The Ruling Is In Harmony with Supreme Court Precedent

In the Fourth Circuit, the Petitioner argued that the proprietary capacity exception applied as a defense to Respondents' preemption claim. (A-55). The Fourth Circuit disposed of this contention by first delineating the purposes of the statute at issue, the Magnuson-Stevens Fishery Conservation and Management Act ("Magnuson-Stevens Act"), 16 U.S.C. §§ 1801-1883 (A-57 to 58), and then by referring to its extensive analysis earlier in the opinion addressing the City's motive and bases for the regulation. (A-46 to 49). Accordingly, the Panel concluded:

> The City does not say that a proprietary exception may be inferred from these purposes [of the Magnuson-Stevens Act] or from any other basis. Rather, it points to what it did as a predicate for existence of an exception. It refers to its passing a resolution as opposed to adopting an ordinance and it denies that it was intending to regulate fish (**a denial we have rejected**). This alleged state of

> mind does not appear to have been made known to defendants, and it is inconsistent with the face of the resolution itself.

(A-58) (emphasis added).

This approach follows, and is consistent with, this Court's holding in *Building & Construction Trades Council v. Associated Builders & Contractors*, 507 U.S. 218 (1993). In *Building & Construction Trades*, this Court distinguished between a governmental entity acting as a business person and one acting to set policy. "When the State acts as regulator, it performs a role that is characteristically a governmental rather than a private role, boycotts notwithstanding. Moreover, as a regulator of private conduct the state is more powerful than private parties. These distinctions are far less significant when the State acts as a market participant **with no interest in setting policy**." 507 U.S. at 230 (emphasis added).

For its part, the Fourth Circuit held as a matter of fact in this specific case that the City acted as a regulator with a policy, not a business, motive[3], and that it passed what amounts to a law to do so. The Panel examined and then rejected the City's *post hoc* cavils about the difference between a resolution and an ordinance, as follows:

> The City intended the resolution to be an obstacle. Utilization of longline tackle by

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[3] Judge Luttig's dissent and the district court's decision highlight that the issue of whether the City was regulating presents "a very fact specific determination." (A-67 (quoting J.A. 345) (district court opinion)).

> a vessel was a means to deny access to the docks by longline vessels, and denial of access was a means to control or limit the swordfish industry in waters off South Carolina and to discourage non-local vessels from coming to fish in those waters. The City's opposition was directed at the industry.

(A-49).[4] Indeed, devoid from the City's resolution was any business-related justification for kicking the longliners out. As noted above, the Panel found no such justification. (A-58).

Further, the Fourth Circuit found no explicit creation of a zone of protected market conduct in the Magnuson-Stevens Act or the case law implementing it. (A-57 to 58). Then, after an extensive analysis of the structure of the federal fishery management system, both in general (A-28 to 30), and as applied to the pelagic longline fishery operating around Charleston (A-36 to 41), the Panel found that the City would have had to distort the Magnuson-Stevens Act's provisions in order to defeat preemption by way of implying a statutory basis for the proprietary capacity exception. (A-57 to 58). Accordingly, in examining the purposes of the Magnuson-Stevens Act, the Panel found that no explicit **or** implicit basis existed for such an exception to preemption. (A-58).

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[4] Logically, the Panel's decision that the resolution amounted to "regulation," A-50, 51, 58, **itself** determines the issue relating to the application of the proprietary capacity exception. As this Court has held, "Our decisions in the area support the distinction between government as a regulator and government as proprietor." *Building & Construction Trades Council*, 507 U.S. at 227. Judge Luttig's dissent is consistent. (A-66 to 67) ("As to the first flaw, 'preemption doctrines apply only to state regulation . . . .'") (citation omitted).

Petitioners unavailingly try to contrast the Panel's analysis under the Magnuson-Stevens Act with the analysis of the National Labor Relations Act conducted by this Court in *Building & Construction Trades*, 507 U.S. at 227 ("We have held consistently that the NLRA was intended to supplant state labor *regulation*, not all legitimate state activity that affects labor."). Yet, while the ultimate holdings are different, the Panel faithfully followed this Court's analytical framework. As noted, the Panel did not ignore the standard set out in *Building & Construction Trades* or the Supreme Court precedent from the dormant commerce clause area, *Reeves, Inc. v. Stake*, 447 U.S. 429 (1980), and *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976). In fact, the Panel set it forth correctly and in the broadest possible manner: does the statute involved explicitly provide for a zone of proprietary activity and, if not, can one be implied? (A-56 to 57; *quoting Building & Constructions Trades*, 507 U.S. at 231). Indeed, the Supreme Court in *Building & Construction Trades* undertook precisely the same consideration of whether an explicit or implicit statutory basis for a proprietary capacity exception existed under the NLRA. *See* 507 U.S. at 224-25. Petitioner cannot distort the Panel's elucidation of the proper legal inquiry as to the exception set forth by this Court.

At its essence, then, Petitioner's claim is that because the Fourth Circuit ruled that the proprietary capacity exception did not apply to this particular set of factual circumstances – in contrast to the Supreme Court's factual conclusion in *Building & Construction Trades* – it necessarily misapplied the legal standard. Any fair examination of the decision reveals, however, that the regulatory nature of the City ordinance in this case differed from the commercial nature of the actions

in *Building & Construction Trades. See* 507 U.S. at 232. Accordingly, the Panel's decision is in accord with this Court's precedent.

B. The Ruling Does Not Conflict With the Law of Other Circuits

The Petitioner also maintains that the Fourth Circuit decision is in conflict with a number of other circuit court decisions. Again, this contention attempts to manufacture conflict where none exists.

As noted, in this matter, the Panel inquired whether the Magnuson-Stevens Act "creat[ed] a proprietary exception" or whether there is any "basis for concluding that such an exception is implied." (A-57). This approach mirrors that of **every** other opinion cited by Petitioner in support of its argument. Specifically, just as the Panel did in this matter, each circuit court examined the federal statute at issue to determine whether it either explicitly or implicitly permitted the exception:

Second Circuit—In *Sprint Spectrum L.P. v. Mills*, 283 F.3d 404, 420 (2d Cir. 2002), the court stated "we see nothing in the [statute] to suggest that Congress meant to preempt a governmental entity's conduct that does not amount to regulation; and the structure and language of the TCA suggest precisely the contrary intent. . . . Thus, unless a limitation is provided in [the statute], we must infer that Congress's intent to preempt did not extend so far."

Fifth Circuit—In *Cardinal Towing & Auto Repair, Inc. v. Bedford, Texas*, 180 F.3d 686, 695 (5th Cir. 1999), the court examined whether a city towing ordinance was exempted from federal preemption by

the proprietary capacity exception. In examining the federal statute, the court concluded that the federal statute "allowed for a proprietary analysis" and that the "spirit and purpose" of the statute was consistent with such a result.

Sixth Circuit—In *Petrey v. Toledo*, 246 F.3d 548, 557 (6th Cir. 2001)[5], the court held that the express preemption provision at issue in the federal statute was strikingly similar to the ERISA preemption statute to which the proprietary exception applied and "aside from the statutory language, the municipal-proprietor exception is consistent with the purpose of [the federal statute]."

Ninth Circuit—In *Alameda Newspapers, Inc. v. Oakland*, 95 F.3d 1406, 1416 (9th Cir. 1996), the court held "we are not willing to assume that Congress wished to limit the right of states or municipalities to participate in consumer boycotts or intended to compel them to act in a manner that contravenes their civic consciences – at least in cases in which their action would not have some 'real effect' or practical economic impact on the employer that is either different from that of the ordinary consumer or is otherwise governmental in nature."

While Petitioner cites each of these cases in support of its assertion that the Fourth Circuit misapplied the law pertaining to preemption (Pet. at 20-23), there is no actual conflict. The only difference between these cases is factual. In other words, in each of the aforementioned matters, the court assessed the statute at issue and held that, given the facts at issue,

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Reversed on other grounds, City of Columbus v. Ours Garage & Wrecker Service, Inc., 536 U.S. 424 (2002).

the proprietary exception would be applied under the statute at issue. In this matter, relying on the extensive regulation applied by the Magnuson-Stevens Act and strong evidence that the City intended to regulate the use of longline fishing gear (A-57 to 58), the Panel reached a different result. On this record, *certiorari* is simply not warranted.

II. PETITIONER MERELY CHALLENGES ONLY THE FOURTH CIRCUIT'S FACTUAL DECISION THAT ALL LONGLINE FISHING WAS PREEMPTED BY THE CITY ORDINANCE

Petitioner's second assertion is that the City resolution "does not obstruct the federal interest intended to be furthered by the [Magnuson-Stevens] Act." Pet. at 24. Petitioner does not assert that the Panel misapplied the basic tenets of federal preemption law. Rather, it asserts that the ordinance would not bar landings by longliners in the Charleston area and thus the system created by federal regulations expressly allowing such landing would not be frustrated *Id.*

In echoing the dissent to the Appeals Court's decision (A-66 to 70), Petitioner focuses upon the practical effects of the City's ban on landings by longline fishermen. Pet. at 27-28. This issue, however, is a strictly factual one, and even the dissenting opinion does not take issue with the majority's analysis of the law of preemption, but instead addressed the factual issue of the quantum of "interference with activities protected by the Magnuson Act." (A-68).[6]

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[6] Indeed, as to the law, Judge Luttig agreed with the majority of the Panel that, "Allowing individual municipalities to prevent longline fishermen from landing in their respective jurisdictions would allow municipalities to produce, piecemeal, conflicts such as

As to the application of the facts to the preemption doctrine, the Panel assessed the evidence in the summary judgment record regarding the preclusive effects of the City ordinance and the availability of alternative landing sites (A-33 to 36). It concluded that no other viable landing spots existed and thus, that legal landings by longliners were frustrated (*Id.*). Petitioners ask this court to second-guess that factual decision on the summary judgment record.

As this issue is a factual one, Supreme Court rules strongly disfavor a grant of *certiorari* on this basis. Supreme Court Rule 10 ("A petition for a writ of Certiorari is rarely granted when the asserted error consists of erroneous factual findings . . . .").

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that held to be preempted in *Southeastern Fisheries Assoc., Inc. v. Chiles*, 979 F.2d 1504 (11th Cir. 1992)." (A-68).

CONCLUSION

For all of the foregoing reasons, Respondents respectfully request that this Honorable Court deny the *Petition for Certiorari*.

Respectfully submitted,

Stanley M. Brand
Counsel of Record
David E. Frulla
Andrew D. Herman
Brand & Frulla, P.C.
923 15th Street, N.W.
Washington, DC 20005
(202) 662-9700
Attorneys for Respondents A Fishermen's Best, Inc., AFB of Charleston, Inc., Ivan Miller, and the Fishing Vessel Tri Liner